(1)

Supreme Court, U.S.
FILED

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No. 01-632

In the

SUPREME COURT OF THE UNITED STATES

ROGER A. NOBACK, pro se

Petitioner,

versus

TRANSCISCO INDUSTRIES, INC., (Debtor)

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. In determining the amount of a reasonable fee, under 11 U.S.C. §330(a)(1)[1] or otherwise, can application of a logically foolish principle, which seeks to establish and measure a proportion between two quantities which are not measured by the same measure, constitute the exercise of judicial discretion and excuse a lower court's refusal and failure to properly apply any of the at least 4 categories of principles mandated by the established authority of the U.S. Supreme Court, the U.S. Congress, the American Bar Association Code of Professional Responsibility, and F.R.C.P. 52, incorporated in contested matters under 11 U.S.C. §101 et. seq. by F.R.B.P. 9014?

2. Is it an abuse of judicial discretion for the appellate courts to deny Applicant's requests to prove that all or substantially all of the assertions of fact in the district court's order denying Applicant's appeal were false and copied verbatim or substantially verbatim from the over 100 false assertions of fact without appropriate citations in the record in the debtor's brief when the district court instead permitted Applicant to identify a sample of 8 of such false assertions of fact in its order and such court admitted that 7 of such sample of 8 false assertions of fact (87.5%) were in fact false and copied verbatim from the false assertions of fact without appropriate citations to the record in debtor's brief and when it is common sense and a truth of high school mathematics that such fact makes it highly likely that all or substantialy all of the assertions of fact contained in the district court's order were false?

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[1] As in effect prior to October 22, 1994, §702(b)(1) of The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (enacted on October 22, 1994).

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Official and unofficial reports

None of the opinions and orders entered in Applicant's fee application proceedings and his appeal thereof have been reported in the official or unofficial reports.

Supreme Court Jurisdiction

The Ninth Circuit's Memorandum was filed March 23, 2001 and its Order was filed May 11, 2001 denying petitioner's petition for rehearing and rehearing en banc. Supreme Court jurisdiction of this petition is conferred by 28 U.S.C. §1254(1).

Statute 11 U.S.C. §330(a)(1)

"(a)After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney--

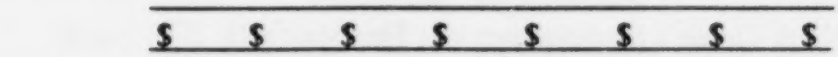
(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title;..."

STATEMENT OF THE CASE

The debtor's reorganization was one of the most successful Chapter 11 reorganizations of a publicly traded debtor in history, from the standpoint of the stockholders, according to a study[2] funded by the National Science Foundation ("National Science Foundation Study"), in which the stockholders retained at least 90% of the reorganized debtor's common stock valued at $15,750,000, (see Fact §5.b, d.), and Roger A. Noback ("Applicant"), as counsel for the Official Equity Security Holders' Committee of the debtor, billed hourly fees of

[2] The National Science Foundation Study is contained in a series of 5 law review articles, including without limitation, the following: Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies, 139 U. Pa. L. Rev. 125 (1990) ["Pennsylvania Report"]; Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies, 78 Cornell L.Rev. 597 (1993) ["Cornell Report"].

approximately $340,000, approximately 2% of such amount recovered by the stockholders. The shaded portion at the left of the following bar graph illustrates the minuscule proportion that Applicant's requested hourly fees bear to the amount recovered by the stockholders:



The bankruptcy court for the Northern District Court of California denied substantially all such hourly fees requested by Applicant and the district court denied Applicant's appeal of such award and denied Applicant's motion for sanctions [ER-53 #139 DC; ER-55A (pp. 3-225)] against the debtor and debtor's counsel for, inter alia, intentionally making over 100 false assertions of fact without appropriate citations to the record in debtor's appellee's brief [ER-45 #97DC]. The Ninth Circuit Court of Appeals affirmed.

STATEMENT OF FACTS

1. Debtor's case was a complex Chapter 11 reorganization case of a publicly traded debtor listed on the AMEX [Debtor's Reply Memorandum filed February 18, 1992 (9-12) [ER-3 #327(4-7)], Applicant's Reply filed January 29, 1996 #1425].

a. Three official committees were appointed in the case under 11 U.S.C. §1102(a) by the U.S. Trustee, an arm of the U.S. Justice Department, to represent the committees' respective constituencies under 11 U.S.C. §1103(c): an Official Unsecured Bondholders' Committee ("OBC") to represent the holders ("junk-bondholders" or "bondholders") of the convertible, subordinated notes ("Junk Bonds," or "Bonds");[3] an Official Unsecured Creditors' Committee ("OCC") to represent the other unsecured creditors, including the banks; and an Official Equity Security Holders' Committee ("OEC") to represent the non-insider stockholders, who owned approximately two-thirds or more of the outstanding shares of common stock of the debtor.[4]

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[3] ["Bondholders' Solicitation Section" (8:22-26) of Joint Disclosure Statement filed August 27, 1992; "Cash Distribution After Subordination" section of Exhibit A to "Creditors' Solicitation Section" of such disclosure statement.].

[4] Comments by United States Trustee (4:17 and First paragraph of Exhibit A) filed January 22, 1992 #258; OEC's Partial Objections filed August 6, 1992 (24:13-16 and p. 2 of Attachment to Appendix 3 thereto [ER-9 #519(44)]; Applicant's Declaration

b. By Order filed March 4, 1992 (p. 8) [ER-4 #346] the court approved the OEC's Amended Application filed December 19, 1991 (6:25-7:10) [ER-1 #224] to retain Applicant as the OEC's counsel at an hourly rate basis of efficiency of $100/hr. The bankruptcy counsel for the debtor, the OCC and the OBC each charged an average effective rate of efficiency of approximately $200/hr. during the case [fee applications filed thereby at or about March 1, March 27, 1992, May 27 and 28, October 22-28, 1992 and February 8, 1993].

2. The three official committees and the debtor each filed competing plans, and the court approved the amended disclosure statements describing such 4 competing plans by Order filed October 13, 1992 (2:3-8) [ER-18 #608] as containing "adequate information" under 11 U.S.C. §1125 [including such approval of the OEC's Third Amended Disclosure Statement filed October 8, 1992 [ER-16 #601] describing the OEC's Second Amended Plan of Reorganization filed October 8, 1992 [ER-17 #600] and the Second Amended Joint Disclosure Statement filed August 27, 1992 describing the 3 competing plans of the OBC, OCC and the debtor] [Transcript, September 17, 1992, 2:12 p.m. (13:8-10) {ER-15 #627(5)]. Pursuant to such Order filed October 13, 1992 [ER-18 #608], such disclosure statements and plans were distributed to the holders of claims and interests (stock) in the only solicitation of holders with ballots to accept or reject competing plans in the case under 11 U.S.C. §§1125, 1126 and 1129(a)(8)(A); a confirmation hearing was scheduled for December 1, 1992 and objections to such plans were scheduled to be filed November 12, 1992.

The court specifically held at the September 10 and 17, 1992 hearings that the OEC's Second Amended Plan filed September 17, 1992 (and refiled verbatim on October 8, 1992) [ER-14 #1537, ER-17 #600] was legally adequate and did not contain provisions which would make it unconfirmable under 11 U.S.C. §1129 and §1123. [Transcript, September 17, 1992, 2:12 P.M. (6:18-7:8) [ER-15 #627(3-4)]; Transcript, September 10, 1992, 10:52 A.M. (pp. 22-23, 45-46, 56-60, 65:17-21) {ER-11 #626(3-11)}] According to the ballots of such

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and Offer of Proof filed February 8, 1996 (11:24-12:4). Appointment of OCC filed August 16, 1991; Appointment of OBC filed October 4, 1991; and Appointment of OEC filed October 4, 1991, as amended by filings up to January 8, 1992.

holders, the OEC's plan was a good plan which was well done since the OEC's constituency, the non-insider stockholders, overwhelmingly voted to accept the OEC's plan and reject the debtor's plan under 11 U.S.C. §§1125, 1126 and 1129(a)(8)(A) and 50% of the bondholders voting voted to accept the OEC's plan. [Applicant's Motion to Reconsider filed October 4, 1993 (24:5-25:20) {ER-37 #1128(33-34)}] Debtor admitted that "shareholders voted to accept the OEC plan." [Debtor's Response filed October 18, 1993 (9:7) {ER-38 #1133}]

3. The court, by Order filed November 12, 1992 [ER-21], terminated both the solicitation of holders which commenced in October, 1992 and the confirmation hearing on such 4 competing plans of reorganization scheduled for December 1, 1992 before any OEC or other objections to such plans of reorganization were filed or required to be filed, and the OEC thereby did not file any objection to any plan filed by the debtor, the OBC or the OCC.

Such order also authorized the plan proponents to amend their plans and disclosure statements for hearing on the adequacy of such disclosure statements under 11 U.S.C. §1125 on January 14, 1993, as such order was successively amended to extend the dates for such hearing and corresponding document filing because of the inadequacy of the time permitted for the preparation of such amended documents. At such January 14, 1993 hearing the court held that neither the Third Amended Joint Disclosure Statement filed December 22, 1992, which described the three competing plans of the OBC, OCC and the debtor and was amended January 4 and 5, 1993, nor the OEC's Fourth Amended Disclosure Statement filed December 22 and amended December 30, 1992 [ER-22 #714] contained "adequate information" under 11 U.S.C. §1125; denied approval of both such disclosure statements; and deferred indefinitely further hearings on disclosure statements. [see Fact §4.]

4. The court adopted and approved the OEC's objections to the amended joint disclosure statements which described the 3 competing plans of the OBC, OCC and the debtor.[5]

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1. The court approved and adopted fourteen of Applicant's specific objections contained in the OEC's Partial Objections filed August 6, 1992 [ER-9 #519] to the

However, the bankruptcy court refused to hear Applicant's objections to the Joint Disclosure Statement filed August 27, 1992 (which was distributed to holders of claims and interests in the only contested solicitation of acceptances and rejections of plans in the case) which identified material misrepresentations of the debtor's financial condition contained in such Joint Disclosure Statement prepared by creditor committee counsel which were disproven by the correct facts stated in the debtor's 10K report filed with the SEC and which made the debtor appear in worse financial condition than it was, which therefore favored acceptance and confirmation of the two creditor committees' plans as against the OEC's plan on behalf of the non-insider stockholders.

5. The OEC's actions in the case implemented the recommendations of distinguished authorities on Chapter 11 reorganizations of publicly traded debtors for parties representing stockholders and thereby created the circumstances which forced the other plan proponents to withdraw their competing plans and assent to a consensual plan of reorganization favorable to the stockholders.[6]

Original Joint Disclosure Statement filed July 21, 1992. [Transcript, August 13, 1992 (38:14-39:13) [ER-10 #629(3-4)].

Applicant billed $7,510 for 75.1 hours of work in preparing such objection to such Joint Disclosure Statement, an average of $535 (5.35 hours) for each of such 14 approved objections and approximately 11 minutes per page for the over 400 pages of such Joint Disclosure Statement documents. [§14.a.-g. of Applicant's Supplement to Application filed April 9, 1993 {ER-32 #909 (52-55)}].

2. The court adopted the two principal objections in the OEC's First Partial Objections filed January 7, 1993 [ER-25 #723] ("OEC First Partial Objection") to the Third Amended Joint Disclosure Statement filed December 22, 1992 (which was amended January 4 and 5, 1993). The OEC was the only party to make such objections for the benefit of the court and the holders.

Applicant billed $4550 for 45.5 hrs. of work on such objection, an average of approximately $1500 (15 hours) for each of the 3 principal objections approved or adopted by the bankruptcy court or acknowledged by the debtor and approximately 6.8 minutes for each page of such approximately 400 page Joint Disclosure Statement documents. [§31 of Applicant's Supplement to Application filed April 9, 1993 (pp. 77-80) {ER-32 #909(80-83)}].

6 Herzog and King, Collier Bankruptcy Practice Guide (Matthew Bender 1990) ["Collier"] §90.04[9](2), (3), (7) and §90.10[5][a], [e], [6][a], pp. 90-93; Klee, All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code, 53

a. The OBC plan and the OCC plan each extinguished or virtually extinguished the interest of the stockholders, and the OBC supported its extinguishment of the interest of the stockholders by filing a valuation that the debtor was insolvent as a going concern.

b. The OEC's financial advisor valued 100% of the common stock of the debtor, as a going concern under the OEC's proposed strategic business plan and management, at an estimated average value of $17,500,000 [Declaration of Thomas J. Furlong filed January 7, 1993 [ER-23 #726 (4:1-4)] ("OEC's Valuation")] Ninety percent (90%) of such amount equals the $15,750,000 amount set forth in the first paragraph of "Statement of the Case."

Amer.Bank.L.J. 133, 148-149 (1979); Broude, Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative, 39 Bus. Law. 441, 453-4 (1984)("Broude"); Coogan, Confirmation of a Plan Under the Bankruptcy Code, 32 Case W.Res.L.Rev. 301, 362 (1982); Dewing, Financial Policy of Corporations, p. 1335-6 (Ronald Press, 5th Ed. 1953) ["Dewing"]; 124 Cong. Rec. 34,004 (comments of the Senate sponsor of the bill enacted as the Bankruptcy Code); Pennsylvania Report, p. 195-196 (1990)

[§II. of Applicant's Motion filed October 4, 1993 (2:24-6:9, 16:10-19:19) {ER-37 #1128 (11-15, 25-28)}; Applicant's Reply filed January 29, 1996 (1-14) {ER-42 #1425(5-18); §I.B.1. and 2. and C.2. of Applicant's Declaration and Offer of Proof (7:23-8:28, 11:10-4) and §§2 and 9 of Exhibit 32 thereof (p.2-5); Applicant's Supplement to Application filed April 9, 1993 ((11:18-17:10, 19:20-21:2; 23:14-27:15; 28:5-16; 58:24-59:11; 61:14-18) {ER-32 #909(14-20, 22-24, 26-31, 61-62, 64}; Applicant's Application filed May 28, 1992 (13:7-15:6, 26:11-22) {ER-5,6 #434, #447}; §2 of Exhibit D-2 to the Declaration of George L. Green filed June 11, 1993; Exhibit B to the OEC's Third Amended Disclosure Statement filed October 8, 1992 {ER-16 #601(31-33)}]

[Transcript, February 20, 1992, 10:34 A.M. (5:4-17); "Bondholders' Solicitation Section" of Joint Disclosure Statement filed August 27, 1992, including (6:7-9); "Bondholders' Solicitation Section" of Joint Disclosure Statement filed December 22, 1992, as amended by filing January 5, 1993; Applicant's Reply filed January 29, 1996, Endnote 10 (13:23-14:13) {ER-42 #1425(17-18); §I.A.1. and endnote 1 of Applicant's Declaration and Offer of Proof filed February 8, 1996 (1:8-15); OBC's Notice of Motion and Motion for Order... filed October 14, 1992 [ER-19 #604] and Declaration of Shawn Bookin filed as pages 19 and 20 thereof; OEC's Fourth Amended Disclosure Statement filed December 30, 1992 (3:25-4:5) [ER-22 #714]; "Creditors Solicitation Section" of Joint Disclosure Statement filed August 27, 1992 and of Joint Disclosure Statement filed December 22, 1992, as amended January 4 and 5, 1993 including Exhibits A and B thereto.]

c. In contrast, the debtor did not implement the recommendations of such distinguished authorities, did not file a valuation of the debtor as a going concern, and the debtor admitted the debtor was insolvent under its proposed business operations and management.[8]

d. Among other things, in the opinion of such distinguished authorities, the OEC's Valuation [the Declaration of Thomas A. Furlong filed January 7, 1993 {ER-23 #726}] is the "settlement imperative" lever and "club" which had a very strong tendency to cause the creditor committees to withdraw their respective plans and assent to the plan of reorganization confirmed in the case. Promptly upon filing of the OEC's Valuation, the OEC called for the court to establish a settlement mechanism to implement the settlement forces unleashed by the actions implemented by the OEC, including the OEC Valuation, the court proceeded to adopt the OEC's recommendation by calling the settlement conference recommended by the OEC (and only the OEC) and at such settlement conference the OBC and OCC assented to the plan favorable to the stockholders which was confirmed, as the OEC and such distinguished authorities predicted. [OEC's First Partial Objection filed January 7, 1993 (18:1-20:9) [ER-25 #723]; Notice of Settlement Conference filed February 11, 1993 [ER-30 #792]; Transcript, March 5, 1993, 9:19 p.m. (2:3-20, 11:2-6) [ER-31 #901(3-4)]; Declaration of George L. Green filed

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[8] {["Debtor's Solicitation Section" of Joint Disclosure Statements filed August 27, 1992 (13:26-14:2) and December 21, 1992]; Debtor's Reply Memorandum filed February 18, 1992 (4:26-5:1); Applicant's Reply filed January 29, 1996 (4:20-24) {ER-42 #1425(8)]

[Applicant's Declaration and Offer of Proof filed February 8,1996 (pp. 4, 22-26 and §2 of each of Exhibits C and D-2 to Exhibit D to Exhibit 31); Applicant's Reply filed January 29, 1996 (10:16-11:19) {ER-42 #1425(14-15)}; Applicant's Amended Reply filed October 27, 1993 (11:6-24) [ER-41 #1160(11, 17-22)] and Exhibits A and B thereto; §13.10 of the Joint Disclosure Statement filed June 22, 1993 (101:3-102:19) and Exhibits A and B thereto]

[Debtor's Objection dated September 4, 1992 (5:25-6:4) filed as Exhibit 1 to Stipulation filed April 1, 1997 and confirmed by Order filed April 2, 1997, OCC's Objection filed August 6, 1992 (4:5-11) and OBC's Objection filed August 10, 1992 (2:5-8) and Objection filed September 8, 1992 (2:9-11); Transcript, September 10, 1992, 10:52 a.m. (22:19-23:5) [ER-11 #626(3-4)]}

March 11, 1993 (8:19-13:3); Applicant's Supplement to Application filed April 9, 1993 (80:11-81:11) {ER-32 #909(83-84)]

e. Under the plan confirmed in the Transcisco case, the stockholders retained at least 90% of the reorganized debtor's outstanding common stock and the per share price of the stock went from $0.125 during the case to over $6 on September 3, 1996, when all of the stock of the debtor was purchased by another company with a net worth of over $700,000,000. Such $6/share price evidences the validity of the $17,500,000 valuation of the OEC's financial advisor. [Fact §9 hereof; Joint Disclosure Statement filed June 22, 1993 (70:14-72:14); Applicant's Reply filed September 30, 1996 (5:26-6:6, 6:22-28, 7:23-28, Exhibits 3 and 4) [ER-44 #1469 (1-3, 5, 42-44)] and the second and third paragraphs of p.1 of the document attached as Exhibit 2 thereto), Supplement to Debtor's Response filed September 23, 1996 (2:17-19)].

According to the National Science Foundation Study, typically the stockholders receive only at most a token (0-10%) percentage interest in the reorganized debtor's outstanding common stock [Patterns in the Bankruptcy Reorganizations of Large, Publicly Held Companies, 78 Cornell Law Review 575, 611 and 618 (1993) ("Cornell Report")].

If the OEC had not filed its valuation of the debtor as a going concern during the case to the effect that the debtor's stock had an estimated average value of $17,500,000 (the value later reflected by the above described $6 per share purchase price), the debtor would have been considered insolvent under the only other valuation of the debtor filed in the case and the debtor's admission that the debtor was insolvent under its proposed management and business operations.[9]

f. Nevertheless, at the January 14, 1993 hearing on disclosure statements, the bankruptcy court revoked, sua sponte, the

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[9] According to the Cornell Report (page 611), in two-thirds of the reorganizations of insolvent debtors studied in the National Science Foundation Study the stockholders retained 10% or less of the reorganized debtor's common stock. In the table on page 618 of the Cornell Report, in only one other reorganization case of an insolvent debtor did the stockholders receive a higher percentage of the common stock of the reorganized debtor than in the Transcisco case, a result obtained by transferring substantially all the debtor's assets to creditors [Cornell Report, note 55, page 611; Pennsylvania Report, Table III, page 142.]

right of the OEC to retain professionals at the expense of the estate, for the reason that the OEC implemented the recommendations of distinguished authorities on Chapter 11 reorganizations by preparing and filing the OEC's Valuation and based also on a series of false findings of fact which are disproven by the court's own earlier orders and rulings in the case and which the district court constructively admitted were false, as referenced in Fact §10 and Argument §2 hereof. By such revocation and findings the record evidences that such court adopted a tactic as old as rhetoric itself [Aristotle, The Art of Rhetoric, Section 5, Chapter 1.12 (Penguin Books 1991, Transl. By H. Lawson-Tancred)] and slandered the OEC and Applicant to cover up its own improper actions toward the OEC and the non-insider stockholders during the case (including without limitation its refusal to hear about the material misrepresentations in the Joint Disclosure Statement referenced in Fact §4).

6. The bankruptcy court expressly ruled that it would not make any finding in the case, and did not make any finding, regarding whether the debtor was solvent or insolvent, as a going concern, as admitted by the debtor [Debtor's Appellee's Brief filed August 31, 1998 (11:16-19) {ER-45 #97DC(16)}] in the district court on appeal], and therefore the court made no finding regarding the value of the debtor's common stock, the "amount at stake" for the stockholders, at the January 14, 1993 hearing or otherwise.[10]

7. The court found that Applicant's fee applications were adequate and complied with applicable regulations, "I think the papers adequately address the situation." [Transcript of Proceedings, April 19, 1993, (5:8-9) [ER-33 #955(3)]. Applicant's Supplement to application filed April 9, 1998 [ER-32 #909] was his final fee application ("Final Fee Application") heard April 19, 1993 covering services performed

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[10] [OBC's Motion for order declaring debtor is insolvent for purposes of §1129 filed October 14, 1992 [ER-19 #604] ("Pre-emptive Cramdown Motion") and attached Valuation by Shawn Bookin, the OBC's financial advisor, at pp. 19-20 thereof (see Fact §9.a. hereof); Declaration of Thomas J. Furlong filed January 7, 1993 [ER-23 #726(3-4)] as OEC's opposition to the OBC's Pre-emptive Cramdown Motion (pp. 3-4); Transcript, January 14, 1993 (56:20-58:11, 64:8-65:5, 80:19-81:3) [ER-27 #763(9-15)]; Order [ER-39 #1137] and Findings of fact and conclusions of law each filed October 20, 1993. {ER-40 #1138}]

during the 8.5 month period ending January 14, 1993. Applicant's Applications filed June 1 [ER-7 #445] and May 28, 1992 [ER-5 and 6, #434, #447], respectively, constitute Applicant's interim fee applications ("Interim Fee Applications") heard June 15, 1992 covering services performed during the 8 months ended April 30, 1992.][11]

a. Such fee applications set forth over 100 discrete categories of service performed by Applicant on behalf of the OEC and the number of hours billed for each such category as required by F.R.B.P. 2016 and the court's Guidelines for compensation and expense reimbursement of professionals of the United States Bankruptcy Court for the Northern District of California issued June 3, 1991 and amended August 1, 1992 ("Compensation Guidelines") in §3 "Project Billing" under the first heading "The Narrative", and accordingly Applicant produced and filed fee applications which reasonably complied with the Compensation Guidelines and were adequate for the bankruptcy court to compute a "reasonable fee" determined by multiplying a reasonable number of hours times the corresponding reasonable hourly rate for each such category.

b. Awards in similar cases (Johnson factor #12): Fees requested by Applicant were substantially less than the awards to counsel for a comparable committee (the OBC) in the same case. A relevant comparable award are the awards for counsel for the OBC, the most active creditor committee opposing the OEC and the debtor, whose constituency was subordinated to the banks (see Fact §1.a.) but senior to the stockholders.[12] The bankruptcy court approved

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[11] Applicant's Supplement to application filed April 9, 1998 (2:1-12, 3:15-17) [ER-32 #909(5-6)] expressly completely restated the Application filed March 29, 1998 (#898), except for the time records attached as Exhibits A and B, which were incorporated by reference into the Supplement to application filed April 9, 1993.

[12] Among other things, a comparison with the OBC was relevant since the OBC's plans extinguished the stockholders' interest and were supported by a going concern valuation demonstrating the debtor was insolvent under the management and business plan proposed by the OBC (see Fact §5.a.).

Also, by approving substantially all OBC counsel's fees (which were higher than the combined fees of bankruptcy counsel for the debtor and OCC) the court accepted the principle that the more "junior" class had to expend more time and money for services to solve the problems of each class of more "senior" interests while the senior interests can, relatively speaking, ignore those lower down the chain and not

substantially all (over 95%) of the fees requested by the OBC's counsel in the case. OBC counsel billed approximately four times the dollar amount of fees and twice the number of hours for preparation of essentially one plan and disclosure statement during the 15 month period ending December 31, 1992 (approximately 1430 hours and $286,000) as Applicant billed for the preparation of three different plans and the disclosure statements describing them during the 15½ month period ending January 14, 1993 (approximately 770 hours and $77,000).[13] [Manatt firm's Amended First Application filed March 27, 1992 as revised docket no. 370 (page 28, ll. 23-25); Second Application filed May 27, 1992 as docket no. 426 (18:20); Third Application filed October 28, 1992 as docket no. 624 (17:25); Fourth Application filed February 8, 1993 as docket no. 781 (18:13, 20-21).] [Applicant's Supplement to Application filed April 9, 1992 {ER-32 #909(12-30, 74-80)}: §3., §4, §28, §29; Applicant's Application filed May 28, 1992 {ER-5 #434} (11:19-15:6, 28:20-24)(29:3-4).] Counsel for the OBC sought aggregate fees for all services in the case through December 31, 1992 of approximately $445,000 in comparison to Applicant's aggregate requested hourly fees of $340,000 for the 15.5 months enced

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spend as much time on them in reliance on the priority position accorded them by 11 U.S.C. 1129(b) and (in the case of contractually subordinated holders) 11 U.S.C. §510(a):

> "(a junior class has to be)...vigilant for opportunities to maximize values and ensure that...(those senior classes are)....not satisfied at the expense of the...(junior class)." [OBC Counsel's Amended First Application filed March 27, 1992 (3:1-4:24) #370; Order filed November 16, 1992 #664].

[13] Even assuming the grossly erroneous aggregate number of 1500 hours which the district court's Order filed January 14, 1999 (10:14-15) falsely asserted Applicant requested not only for preparing the OEC's disclosure statement but also for preparing the OEC's objections to the other disclosure statements (and which such court's order copied verbatim from such false assertion of fact without appropriate citations to the record in debtor's appellee's brief), the dollar amount associated with such falsely ascribed number of hours is still only $150,000, only 52% of the dollar amount requested by the OBC's counsel for preparing only the OBC's plan and disclosure statement. [By substituting the weasel-worded phrase "for work related to" for the word "preparing" in such court's Amended Order filed February 2, 1999 (10:6-8) in response to Applicant's Petition for Rehearing (see Fact §7.b. hereof), such court still did not correctly amend its false assertion or make its statement relevant (see Fact §8.a. and 10 and Argument §2 hereof.].

January 14, 1993.

8. At the final fee application hearing, the bankruptcy court stated that in awarding fees it would "look at the work that was performed and what was at stake," and then proceeded to ignore the "amount at stake" for the stockholders (see Fact §6 and Statement of the Case) and over 90 (over 90%) of the over 100 categories of work performed and described in Applicant's interim and final fee applications.

a. Such court awarded a total of only $70,000 of fees allocable only for the following services [Transcript, April 19, 1993 (7:13-8:6)] [ER-33 #955(5-6)]:

i. "Preparation of the...(OEC's)...plan and disclosure statement", which the court found were "not very well done", and

ii. "Preparation of...(the OEC's)...objections" to the plans and disclosure statements of the OBC, OCC and the debtor, which the court found were "not very well done" and "not very sound." The only reasons given for such an award were scanty, cryptic and pejorative: the reasons in a.i. and ii. above and Applicant's "gross inefficiency" [Transcript, April 19, 1993 (6:7) {ER-33 #955(4)].

Such $70,000 award constituted approximately 80% of the $89,000 (for 890 hours) which Applicant requested for such services (the 7 categories of services listed in the OEC's fee applications for which fees were so awarded are identified in Fact §4 and §7.b. hereof).

b. Such court awarded no fees for any of the over 90 other categories of services described in Applicant's fee applications ("Denied Categories of Service") totaling approximately $270,000, even though such services were within the powers of the OEC under 11 U.S.C. §1103(c), Applicant was instructed to perform such services by the OEC, and such services were reasonably calculated to advance the interests of the constituency of the OEC, the non-insider stockholders, and were therefore "necessary services" under 11 U.S.C. §330(a)(1) as referenced in Argument §1.c.vi.[14]

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[14] Such Denied Categories of Service included without limitation Applicant's services on the following mattrs:

1. Eleven OEC motions, all of which the court approved or adopted, for which Applicant requested approximately $26,000 in hourly fees, an average of $2,364 per motion.

c. A hearing pursuant to the court's grant of Applicant's timely motion for rehearing of the final fee award was delayed pursuant to Order filed August 9, 1993 and debtor's agreement until 1996 when the court essentially repeated the same type of scanty, cryptic, pejorative findings [Transcript, February 9, 1996 (27-29) [ER-43 #1442(3-5)]. Debtor objected to Applicant's filings in all of his fee application proceedings.

d. The bankruptcy judge, sua sponte, without citation of any authority, refused to apply "existing rules and precedent" in the award of a reasonable fee to Applicant because:

> "The hours billed by...(Applicant are)...grossly... disproportionate to what was at stake..." [Transcript, April 19, 1993 (5:21-22, 6:3-8) [#955]

Such court did not state any other rules or law it was applying in determining Applicant's reasonable fee in substitution for existing rules and precedent nor provide any policy reasons why existing rules and precedent should be jettisoned. Such court refused to determine Applicant's reasonable fee on an hourly rate basis. On appeal to the District Court, the debtor and District Court Judge cited the following statement in In re Kitchen Factors, 143 B.R. 560, 562 (9th Cir. BAP 1992) ("KF") as the authority for the bankruptcy court's application of the foolish principle the bankruptcy court applied to justify the

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2. The two simultaneously argued contested matters involving, inter alia, Applicant's successful defense against the multiple objections to the U.S. Trustee's appointment of the OEC, in one of the most extensively argued contested matters in the case. The bankruptcy court was obligated to award a reasonable fee for such services pursuant to its December 20, 1991 ruling approving Applicant's engagement to conduct such defense on a contingent fee basis.

3. The OEC's monitoring of debtor's ultimately failed attempts to negotiate a plan with the creditors in 1992 and making suggestions to debtor of provisions to include in debtor's plan in the interest of the non-insider stockholders, one of which debtor included in its plan filed July 20, 1992 as a result thereof; preparation for the scheduled December 1, 1992 confirmation hearing, including without limitation the OEC's Valuation (see Fact §9.b.) and the OEC Strategic Plan attached as Exhibit 3 thereto; identification of, interviewing and selecting prospective financial advisors for the OEC; attendance and participation in OEC meetings; attendance at and preparation for the failed plan settlement conference on September 11, 1992 ordered by the court before Judge Newsome; preparation of fee applications.

bankruptcy court's refusal to apply existing rules and precedent in the determination of Applicant's fee [Appellee's Opening Brief filed August 31, 1998 (16:18-21) [ER-45 #97DC(21)], Amended Order filed February 2, 1999 (4:28-5:3, 5:10-12, 5:25-6:3) {ER-48 #131 DC]:

> "In this case the detail of time spent by counsel is not helpful because it is grossly disproportionate to the amounts at stake."

The Court of Appeals affirmed "for the reasons stated by the District Court."

9. As reflected in other portions of this statement of facts, Applicant's filings in his fee application proceedings pointed out substantial evidence, and demonstrated to the bankruptcy court a variety of relevant information, which was contrary to the bankruptcy court's findings, but which the bankruptcy court did not discuss, including without limitation the following:

a. The court approved or adopted substantially all of the over 20 motions and objections made by the OEC during the period Applicant served as counsel to the OEC at the expense of the estate;

b. The court approved the OEC's Disclosure Statement filed October 8, 1992 as containing "adequate information" under 11 U.S.C. §1125 for distribution to the holders in the only solicitation for acceptances and rejections of competing plans in the case;

c. The OEC's constituency, the non-insider stockholders, overwhelmingly voted that the OEC's plan was good by overwhelmingly voting to accept the OEC's plan and reject the debtor's plan under 11 U.S.C. §1125, §1126 and §1129 in the aforementioned solicitation of holders and the court ruled that the OEC's plan did not contain provisions which would render it unconfirmable;

d. The OEC and Applicant implemented the recommendations of distinguished authorities on Chapter 11 reorganizations for parties representing the stockholders in a Chapter 11 case of a publicly traded debtor; and

e. Applicant's requested fees were substantially less than the fees approved by the court for the OBC's counsel during comparable periods and on comparable types of work, and the OEC's fees constituted less than 2% of the amount obtained by the shareholders in the confirmed plan of reorganization.

10. Applicant asserted in his petition for rehearing of the district court's judgment and order filed January 14, 1999 that all or substantially all of the assertions of fact contained in such order were false and copied verbatim or substantially verbatim from the over 100 false assertions of fact without appropriate citations to the record contained in debtor's appellee's brief, and Applicant asked permission to identify such false assertions of fact in such order, but the district court permitted Applicant to identify a sample of only 8 of such false assertions of fact. The district court admitted in its Order Denying Appellant's Petition for Rehearing accompanying its Amended Order filed February 2, 1999 that 7 of the permitted sample of only 8 (87.5%) of the false assertions of fact in the district court's order filed January 14, 1999 were false and copied verbatim from the false assertions of fact contained in debtor's appellee's brief, but such court did not grant the requested petition or request on the grounds that it was immaterial that such sample of assertions was false. However, it is common sense and a truth of high school mathematics that the fact that such sample of assertions was false made it extremely highly likely that all or substantially all of the assertions of fact contained in the court's order filed January 14, 1999 and Amended Order filed February 2, 1999 were false and copied verbatim or substantially verbatim from the myriad false assertions of fact without appropriate citations from the record in debtor's brief. The Court of Appeals denied comparable requests filed by Applicant to identify such false assertions of fact without appropriate citations to the record, and the other false assertions of fact by the bankruptcy court and the debtor, after Applicant informed such court that the district court constructively admitted that all or substantially all of the assertions of fact in its order were false as referenced above in this Fact section. [Applicant's Motion filed April 25, 2000 to file his Requested Enlarged Brief filed April 14, 2000, Petition for rehearing filed April 12, 2001 and such court's Orders filed May 26, 2000 and May 11, 2001].

ARGUMENT

1. In the determination of Applicant's reasonable fee, the bankruptcy judge and District and Circuit Courts on appeal applied a logically foolish principle, which improperly seeks to establish and

measure a proportion between two quantities which are not measured by the same measure and therefore cannot rationally be applied to any facts or circumstances (and which was made up "out of thin air"), cannot constitute the exercise of judicial discretion, cannot justify the substitution of an arbitrary alternative basis of compensation for a requested hourly rate basis of compensation which was previously approved by the court, and cannot excuse a lower court's refusal and failure to properly apply any of the at least 4 categories of principles mandated by the established authority of the U.S. Supreme Court, the U.S. Congress, the American Bar Association Code of Professional Responsibility, and F.R.C.P. 52, incorporated by reference in contested matters by F.R.B.P. 9014.

a. As set forth in Fact §8.d., the bankruptcy judge, sua sponte, without providing citation of any authority or policy reasons for its action, refused to apply "existing rules and precedent" in the award of a reasonable fee because:

> "The hours billed by...(Applicant are)...grossly... disproportionate to what was at stake..." [Transcript, April 19, 1993 (5:21-22, 6:3-8) [#955] ,

and such court did not substitute any other rules therefore.
On appeal, the District Court and Court of Appeals sanctioned such refusal on such basis.

i. Such principle enunciated by the bankruptcy court and the principle enunciated by the KF court also applied by the district and circuit courts on appeal each depends for its application upon the logically and practically impossible establishment and measurement of a proportion between two quantities that are not measured by the same measure, namely, a quantity of work measured by a unit of time (namely, hours) and a quantity recovered or recoverable ("at stake") measured by a unit of economic value (namely dollars). For this reason, such principles constitute foolish nonsense which cannot rationally be applied to any facts or circumstances, as a matter of logic and common sense.

ii. The agreement of the following distinguished thinkers in disparate fields throughout the past 2,500 years establishes that it is fallacious logic and foolish nonsense to establish and measure

a proportion between two such quantities that are not measured by the same measure, as set forth in the cited texts contained in Appendix 1 hereto: Euclid, Elements, Book Ten, "Definitions" I.1., "Propositions" 5-8; Aristotle, Categories, Chapter 7; Locke, John, An Essay Concerning Human Understanding, Book II, Chapter XIV, §18 and Chapter XVII, §13; Burke, Edmund, quoted under the definition of "proportion." in Webster's New International Dictionary of the English Language (G.& C. Merriam Company 1928); Weber, Max, Economy and Society (English Translation published by University of California Press 1978) Vol. I., p. 86; Bonbright, James C., The Valuation of Property (McGraw-Hill Book Company, Inc. 1937 - Published under the auspices of the Columbia University Council for Research in the Social Sciences), Vol I, p. 13; Keynes, John Maynard, A Treatise on Money [Harcourt, Brace and Company 1930], p. 3; Paraphrase of some of Aristotle's comments in §7 of the Categories in Orwell, G., Politics and the English Language; Hand, Judge Learned, The Spirit of Liberty, p. 307 [Alfred A. Knopf 1960]

iii. The inherent logical fallacy, foolish nonsense and illegality involved in the application of the above mentioned such principle applied by the bankruptcy, district and circuit courts is also illustrated by the differing principles established by the 8th and 12th Johnson factors (see Argument §1.c.i.), the two factors to be taken into account in exercising "billing judgment" [Unsecured Creditors' Committee v Puget Sound Plywood, 924 F2d 955, 959 (9th Cir 1991) and In re Great Sweats, Inc. 113 B.R. 240, 242 (Bankr. E.D. Va. 1990), which applied the 8th Johnson factor], each of which establishes and measures a proportion between two quantities (requested fees and dollar amount at stake) which are measured by the same measure (namely, dollars). No Johnson factor calls for establishing and measuring a proportion between an amount of work measured in hours with an amount recovered, recoverable or otherwise "at stake" measured in dollars.

iv. The application of a principle which is foolish and cannot rationally be applied to any facts and circumstances cannot constitute the exercise of judicial discretion, and constitutes abuse of judicial discretion. The application of a logically foolish principle to

excuse the refusal to apply existing rules and precedent (and justify a freedom from applying any principles) is an exponentially more egregious abuse of judicial discretion.

(1) Logic is an indispensable and necessary tool in rendering legal judgments:

> "if chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law...(W)ithout...(the)...aid...(of logic).....satisfactory solutions of legal problems cannot be reached."

Cardozo, Benjamin N., The Nature of the Judicial Process (Yale University Press 1921), p. 36-8; accord: Pound, Roscoe, An introduction to the philosophy of law (Yale University Press 1954), p. viii.; Holmes, Oliver Wendell, Jr., "The Path of the Law"in Collected Legal Papers (Harcourt Brace and Company 1920) {also published in Harvard Law Review, vol. X, p. 457}, p. 180-1 ["(Logical)... principles governing other phenomena also govern the law...The language of judicial decision is mainly the language of logic."]

It is necessary that an opinion be logical and be expressed logically, although reliance on logic alone may not be sufficient.

> "(M)ost legal questions are resolved syllogistically...the...soundness...(of a syllogism)...depends...upon the truth of the premises."

Posner, Richard A., The problems of jurisprudence (Harvard University Press 1990), p. 42-3; accord: Frank, Jerome, Courts on Trial (Princeton University Press 1949 and 1973), p. 282; Cardozo, Benjamin N., The Growth of the Law, (Yale University Press 1924), p. 62; Aristotle, Prior Analytics, Book II, §18, [The Works of Aristotle Vol.I, W.D. Ross translation in Great Books of the Western World, Vol. 8, Encyclopedia Britannica, Inc. Chicago 1952]

(2) The only "discretion" to which appellate courts are asked to defer when a court is permitted to exercise its discretion has been described by eminent authorities as judicial discretion which amounts to

> "sound"..."judgment"..."guided by fixed legal principles." [1 Wigmore on Evidence §16, p. 753 (Little, Brown and Co.

1983); accord: Moore's Federal Practice 3D, §206.05[1] [Matthew Bender 1997]; United States v Burr, 25 Federal Cases 30, 35 (No. 14,692)(C.Va. 1807).

In order for judgment to be sound, and the principle applied to be a legal principle, the judgment and principle must not be foolish, and the application of a foolish principle by a court cannot constitute the exercise of judicial discretion by such court.

Where "the philosophy...(is)...unsound or distorted...the answers will show the vice, and be perverse." Cardozo, Benjamin N., The Growth of the Law, (Yale University Press 1924), p. 27

(3) According to respected jurists and scholors:

"The major task of the courts is the specific application, in particular lawsuits, of...general rules to the particular facts of those suits." Judge Jerome Frank, Courts on Trial, p. 3 [Princeton University Press 1949 and 1973]

"Rigid legal rules are the mainstay against improper motives on the part of those who administer justice." Pound, R., "Justice According to Law", 13 Col L. Rev. 696 (1913), Llewellyn, K. The Bramble Bush, p. 62 (Oceana Publications 1930)

Maintenance of the existing rules is necessary to allow the realization of the reasonable expectations of attorney officers of the court who take representations in reliance on the expectation that the mandated principles will be rationally applied, not subject to the whim, error or corruption of judicial officials. When there are effectively no rules, or they are permitted to be altered at the whim or humor of the individual judge, there is no way to insure the decision is fair, proper, and uniformly applied, and an invitation is provided to judicial corruption. Proper rules help prevent miscarriages of justice in the first place and provide a realistic prospect for remedy when they occur.

(4) After applying a foolish principle to justify refusal to apply "existing rules and precedent" the bankruptcy and appellate courts do not establish or require any new rules or principles in substitution for the protections of the existing rules and

precedent they have destroyed. This conflicts with the decisions of Courts of Appeals of other circuits, violates one of the central underpinnings of our American legal system, that we are "A government of laws and not men" and cries out for this court's reversal of such a deleterious state of affairs.

v. In any event, the court refused to determine the "amount at stake" for the stockholders (see Fact §6), and hence the court's foolish principle was not even operative according to its own unintelligible terms.[15]

b. The "existing rules and precedent" which the bankruptcy court expressly and improperly refused to apply include, without limitation the following four categories of principles observed by Courts of Appeals of other circuits, the first two of which are required in the exercise of judicial discretion, the third of which is

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[15] The Ninth Circuit court of appeals also supplemented the district court's logically foolish excuse of the bankruptcy court's refusal to apply existing rules and precedent in the award of Applicant's reasonable fee with a cited legal assertion of its own, namely its false assertion that the case of Unsecured Creditors' Committee v Puget Sound Plywood, 924 F2d 955 (9th Cir 1991) stated that a court was excused from applying the lodestar approach, solely in a bankruptcy case, where it could "not realistically quantify to numerical precision" the fee award. Such principle is invalid and erroneous for a variety of reasons, including without limitation the following:

1. Such principle is invalidated by longstanding Supreme Court authority which declares that no fee awards, whether in bankruptcy or non-bankruptcy courts, need to be prepared with mathematical precision [Hensley v Eckerhardt, 103 S.Ct. 1933, 1940 (1983) ("Hensley"), footnote 11].

2. Even if this were a valid principle (which it is not), it cannot be invoked in Applicant's case because the bankruptcy court made no such finding and did not rely on such alleged principle, nor did the district court on appeal.

3. In fact, the Puget Sound court did not adopt any such principle. The Puget Sound case made clear at p. 960 that it was the defendant, Puget Sound Plywood, Inc., not the court, which asserted such "numerical precision" statement in its brief. The court in Puget Sound ignored such "numerical precision" statement in defendant's brief. Instead, by citing In re Great Sweats, 113 B.R. 240 (Bkcy.E.D. Va. 1990), such court adopted the longstanding principle of Hensley v Eckerhardt that a court is excused from using the hourly rate basis for determining a reasonable fee where the fee application is defective in a way that does not permit the reasonable number of hours of service to be determined. Such excuse is not applicable in Applicant's case because the bankruptcy court in Applicant's case found that Applicant's fee application was "adequate" [(Fact §7)].

required by F.R.C.P. 52, incorporated in Applicant's contested matter fee application proceedings by F.R.B.P. 9014, and the fourth category is expressly required by 11 U.S.C. §303(a)(1). But for the application of the logically foolish principle applied by the bankruptcy, district and circuit courts, application of existing rules and precedent, including without limitation the principles referenced below, would require that the bankruptcy court's fee award be reversed and Applicant awarded all or substantially all of his requested fees.

i. Courts of Appeal of other circuits require that the court must explain how each of the 12 "Johnson" factors affects his decision regarding the amount of fees. [Johnson v Georgia Highway Express, Inc., 488 F2d 714, 717 (5th Cir. 1974); Matter of First Colonial Corp. of America, 544 F 2d 1291 (5th Cir 1977); Hensley v Eckerhardt, 103 S.Ct. 1933, 1940 (1983), Footnote 9; Blum v Stenson, 104 S.Ct. 1541, 1548 Footnote 13 (1984); Pennsylvania v Delaware Valley Citizens' Council 106 S.Ct. 3088, 3098 (1986) ("Delaware Valley I"]. When Congress enacted provisions awarding a "reasonable fee," the legislative history cited the 12 Johnson factors applied by the Johnson case as being the factors to apply [S.Rep. No. 94-1011, p.6 (1976); H.Rep. No. 94-15581 p.8 (1976), U.S. Code Cong. & Admin. News 1976, p.5908]. The 12 "Johnson" factors "were taken from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106 (1980)" Delaware Valley I, p. 3097, footnote 7.

Among other things, the bankruptcy court's statement that Applicant's services were performed inefficiently abused judicial discretion because the court did not apply the 8th and 12th Johnson factors in making such determination, and neither the district nor circuit court on appeal made any evaluation according to such 2 Johnson factors [Fact §8]. An evaluation of the record according to the 8th and 12th Johnson factors in fact proves that Applicant exercised billing judgment and performed his services efficiently:

(1) According to the 8th Johnson factor, Applicant's fees constituted only 2% of the dollar value of property the stockholders received in the confirmed plan of reorganization [Fact §5 and "Statement of the Case", first paragraph].

(2) According to the 12th Johnson factor, Applicant's requested fees in total and on the preparation of plans and disclosure statements were substantially lower than the fees awarded for the OBC's counsel [Fact §6].

The bankruptcy court and the district and circuit courts on appeal mentioned assertions of fact regarding only one (8.3%) of the twelve Johnson factors which were relevant to Applicant's fee and which they were required to evaluate: factor no. 3, the court's pejorative characterization of the attorney's skill [Fact §8 hereof]. As to Johnson factor no. 3, the bankruptcy court did not discuss the contrary information presented by Applicant (see Fact §9), as required by the "sufficiency" provisions of F.R.C.P. 52, incorporated by F.R.B.P. 9014 in the contested matters involving Applicant's fee application proceedings (see Argument §1.v.). Further, the bankruptcy court refused to determine the reasonable number of hours to perform the particular services Applicant performed as referenced in his fee application at the $100/hour rate of efficiency approved by the court, and the court did not include a discussion of the influence of the other 11 Johnson factors in such determination of such reasonable number of hours.

The district and circuit courts both expressly ruled, contrary to the Courts of Appeals of other circuits, that the bankruptcy court was excused from applying the Johnson factors in determining Applicant's reasonable fee by the aforementioned foolish principle, over Applicant's arguments to the contrary [e.g., Amended Order filed February 2, 1999 (6:13-16) "under an alternate method...the bankruptcy judge...(needs not provide)...reference to lodestar factors;" Order March 23, 2001, p. 2; §1.b.i.(2) of Applicant's Opening Brief filed July 22, 2001 (pp. 32-37, 45-47)].

ii. The existing rules and precedent regarding the "exercise of judicial discretion" in the determination of a reasonable fee also requires application of another dozen or so principles which Applicant enumerated in his briefs in the district and circuit courts, but space exists for only three of such principles to be haphazardly selected for reference in this petition.

(1) The court must calculate the "lodestar" by multiplying a reasonable hourly rate for the services

performed by the reasonable number of hours to perform such services at such hourly rate. [Blum v Stenson, 104 S.Ct. 1541, 1544 (1984) ("Blum") {citing Hensley v Eckerhardt, 103 S.Ct. 1933, 1939 (1983)}; Pennsylvania v Delaware Valley Citizens' Council 106 S.Ct. 3088, 3098 (1986)("Delaware Valley I") (citing Blum).[16]

(2) If a court decides to eliminate hours of service adequately documented by the attorney in his fee application for specific items of activity, it must identify those hours for the activity and articulate its reasons for their elimination. Failure to do the foregoing constitutes reversible error. [Northcross v Board of Educ. Of Memphis City Schools, 611 F2d 624, 637 (CA 6 1979), cited in Hensley, p. 1938][17]

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[16] Courts in various circuits outside the Ninth Circuit have followed the common sense statement in Hensley, p. 1939 and excused the use of an hourly rate methodology to determine a "reasonable fee" where the fee application was defective in a way that did not permit determination of a reasonable number of hours for the services for which compenstation is sought [e.g., In re Great Sweats, 113 B.R. 240, (Bkcy E.D.Va. 1990)] and also have excused use of an hourly rate methodology by application of the 8th and 5th Johnson factors when the requested fees exceeded the amount recovered and reasonably recoverable by the constituency the fee applicant represented and the court then substituted a customary "percentage of recovery" methodology. [Great Sweats and In re WHET, Inc., 62 B.R. 770 (Bankr. D. Mass. 1988)]. However, in such cases the courts still apply the applicable Johnson factors in determining the amount of a reasonable fee.

Such exceptions to the hourly rate methodology do not apply in Applicant's case because, inter alia, the bankruptcy court in Applicant's case expressly found that Applicant's fee application was adequate (Fact §7) and Applicant's requested fees were less than 2% of the dollar amount obtained by the stockholders in the confirmed plan of reorganization.

Such cases illustrate that, outside the Ninth Circuit, if an alternative methodology is substituted for an hourly rate methodology in determining a reasonable fee, such alternative methodology must still satisfy the principles inherent in the exercise of judicial discretion, such as the application of the Johnson factors, and the award cannot be arbitrarily determined, as it was by the bankruptcy court in Applicant's case. [Matter of Continental Illinois Securities Litigation 962 F2d 566, 570 (7th Cir. 1992)].

[17] Applicant's fee applications sufficiently documented his hours of service to require the court to identify the hours in each category it was eliminating and its reasons for such elimination [see Fact §7.]. Applicant's fee applications carefully and painstakingly grouped his activities into over 100 discrete categories with a number of hours accumulated for each discrete category, as required by F.R.B.P. 2016 and the

"(R)ather than disallowing specific items of unreasonable activity the judge slashed broad categories of activity by arbitrary percentages. That won't do..." [Matter of Continental Illinois Securities Litigation 962 F2d 566, 570 (7th Cir. 1992)]

(3) Fees are to be awarded for preparation of fee applications. One of the categories of services referenced in Applicant's fee application which the court did not award any fees for was Applicant's preparation of his three fee applications [$16,500 requested in Applicant's Supplement to Application filed April 9, 1993 (31:10-16)], which in and of itself is a complete and utter abuse of judicial discretion [In re Nucorp Energy, Inc., 764 F 2d 655 (9th Cir 1985)], which the foolish principle excused in Applicant's case.

iii. Applicant's fee application proceedings were heard as contested matters under F.R.B.P. 9014, and such rule applies the provisions of F.R.C.P. 52 to the determination of such matters by virtue of incorporating F.R.B.P. 7052. Because contested matters under F.R.B.P. 9014 proceed by motion or objection, the provision of F.R.C.P. 52 excluding its application to motions is not effective when applied by F.R.B.P. 9014. [Advisory Committee Note to F.R.B.P. 9014 (last sentence of second paragraph); Collier on Bankruptcy (Matthew Bender 15th Ed. Rev. 1997) §7052.02 (p. 7052-5) and §9014.02; In re Hotel Hollywood 95 B.R. 130 (9th Cir. BAP 1988)]

F.R.C.P. 52 requires that the bankruptcy court find the facts specially and state separately its conclusions of law thereon to justify its award and further requires that findings be sufficiently prepared. To be sufficient, findings must be prepared and stated properly.

"(F)indings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps

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Compensation Guidelines (see Fact §7 hereof). The court effectively mocked its own guidelines as well as the fee application process by never referring to any category of service for which no fees were awarded, the inapplicability of any category, or the inapplicability of any hours listed for any category in its award of applicant's fees. Instead the court awarded fees for only approximately 7 (7%) of such over 100 categories of service, denied any compensation for the other over 90 categories of service, and awarded $70,000 (80%) of the $89,000 (for 890 hours) requested by Applicant for such 7 categories of service for which fees were awarded (see Fact §8 hereof).

> by which the trial court reached its ultimate conclusion on each factual issue." [Wright and Miller, Federal Practice and Procedure: Civil 2d Vol. 9A §2579, p. 538-9] "The trial court complies with the mandate of the Rule when...findings of fact and conclusions of law... reveal an understanding analysis of the evidence, a resolution of the material issues of "fact" that penetrate beneath the generality of ultimate conclusions, and an application of the law to those facts." Moore's Federal Practice, §52.05[1], p. 52-101.

The review by the district and circuit courts must be reversed because the district court declined to apply F.R.C.P. 52 as argued by Applicant, instead applying only the principles required by the exercise of judicial discretion [Amended Order filed February 2, 1999 (4:11-14)], and the circuit court affirmed for the reasons stated by the district court.

(1) The findings must give assurance "that the trial court took care in ascertaining the facts." Golf City, Inc. V Wilson Sporting Goods, Co., Inc., 555 F2d 426, 437 (1977). In cases dominated by extraordinary fact-oriented issues, the lower court should discuss substantial contrary evidence presented by the appellant. Golf City, supra, p. 435; Velasquez v City of Abilene, 725 F2d 1017, 1020-21 (5th Cir 1984). Fee award determinations by their nature are dominated by fact-oriented issues [Hensley v Eckerhart, 103 S.Ct. 1933, 1941 (1983)] which in Applicant's case are extraordinary for the reasons set forth in the Fact sections hereof and because the bankruptcy court expressly relied on the entire extensive record of the bankruptcy case, without citing specific portions of it (e.g., 2.5 years until confirmation of a plan and over 1500 documents, many over 200 pages in length) [Transcript, January 14, 1992, 2:35 p.m. (81:12-13)].

The bankruptcy court's findings are insufficient under F.R.C.P. 52 incorporated by F.R.B.P. 9014 because, inter alia, the bankruptcy court did not discuss the substantial evidence presented by Applicant in his fee application proceedings which was contrary to the bankruptcy court's findings that Applicant was incompetent and inefficient, including without limitation the evidence referenced in Fact §10.

(2) When the court is determining dollar amounts requested in the action, such as damages, "the amount allowed

for each item should be stated briefly and clearly." Fuchstadt v United States, 434 F2d 367, 370 (2nd Cir 1970); Wright and Miller, Vol. 9A, p. 544; Carpenters Local 1273 of United Bhd. of Carpenters & Joiners of America v Hill, 398 F.2d 360, 363 (9th Cir 1968). This independently imposes under F.R.C.P. 52 the requirement referenced in Argument §1.c.iii. which is otherwise also imposed in the exercise of judicial discretion. The bankruptcy court violated this by lumping together disparate categories of services and assigning one lump sum fee for all, in the aggregate.

(3) The requirement to make findings properly has as its most "important purpose - that of evoking care on the part of the trial judge in ascertaining the facts." Judge Frank, United States v Forness, 125 F2d 928, 942-3 (2nd Cir 1942). Such requirement also helps guard against judicial corruption by evoking such care and helps expose and provide a remedy for it when it occurs. This court recognizes that federal judges are not immune to corrupt impulses and action:

> "Our society today is faced with an "ethics crisis"....a...corruption... In the last 10 years more federal judges have been indicted, tried, and convicted of felonies, imprisoned and subsequently impeached and removed from office, than at any time in preceding 190 years...the record is not statistically as serious in the state courts..." [Chief Justice Warren Burger, in Ethics in the Courts: Policing Behavior in the Federal Judiciary (National Legal Center for the Public Interest 1990), page ix][18]

The periodic investigations and studies of the bankruptcy administration

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[18] And the record in state courts today is not good [see examples of conduct in Tuohy and Warden, Greylord: Justice, Chicago Style (G.P. Putnam's Sons 1989), all of which took years of FBI investigation, mole stings and set ups to uncover and years more to prosecute.] Other noted commentators and judges have comparable opinions [Chief Judge Richard Posner, Court of Appeals of the Seventh Circuit quoted on p. 22 of Boot, M., Out of Order: Arrogance, corruption and incompetence on the bench (Basic Books 1998); Robert H. Bork (former court of appeals judge) in "Foreword", p. ix of Out of Order: Arrogance, corruption and incompetence on the bench; Shaman, J., Judicial Conduct and Ethics 3rd Ed. (Matthew Bender 2000), p. v-vi; Chicago Tribune, September 20, 2000, Section 1, p. 5]

system under the several bankruptcy enactments in this century, including the enactment of the Bankruptcy Code of 1978, have all reported special concern about, and the need to protect against, corruption in the bankruptcy administration system.[19] This court can take judicial notice of the special concern registered by Chief Justice Burger about the special risks inherent in administration of the bankruptcy system by judges who were not Article III judges and that the Federal Rules of Bankruptcy Procedure, including F.R.B.P. 7052 and 9014, promulgated during Chief Justice Burger's tenure, reflect that concern and provide a remedy against its manifestations.[20] These concerns mandate that in bankruptcy cases there be no exceptions to the application of F.R.C.P. 52 incorporated by F.R.B.P. 9014.

(4) The bankruptcy court also failed to comply with F.R.C.P. 52 because it did not state any conclusions of law by which it made its award of a reasonable fee. Its made up foolish principle was only applied to excuse its refusal to apply existing rules and precedent in the determination of a reasonable fee, it never articulated or applied principles which it proposed to substitute for existing rules and precedent in the determination of a reasonable fee.

(5) While courts of appeal of other

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[19] [Administration of Bankrupt Estates. In the matter of Inquiry into the Administration of Bankruptcy Estates, 71st Cong., 3d Sess. (Comm. Print of House Comm. on the Judiciary 1931); Report on the Study and Investigation of the Work, Activities, Personnel and functions of Protective and reorganization Committees (1937); Report of the Commission of the Bankruptcy Laws of the United States, Part I July 1973, House Document No. 93-137, Part I (pp. 93-4, 96, 248); House Report No. 95-595 §I.D. "The Administration of Bankruptcy Cases - C. The Bankruptcy Ring and E. Historical Problems", p. 95 et. seq.; National Science Foundation Study (particularly Pennsylvania Report, 139 U.Pa.L.Rev. 125, 192)

[20] The Court of Appeals panel's statement that the fee award was correct "regardless of the particular procedure used to determine the fee in this case" (p.3, top) is disproven by, inter alia, and illustrates, the requirements of the above principles. The principles governing the exercise of judicial discretion (and F.R.C.P. 52 incorporated by F.R.B.P. 9014) require that, in order for the award to be valid, the court awarding a "reasonable fee" must provide adequate discussion of the foregoing in relation to the award, including without limitation a discussion of "how" the court determined the amount of the award and assurance that the methodology for determining the amount of the fee is "customary" under the 5th Johnson Factor." Such principles are designed to expose mistake at the appellate level as well as at the level of the trial court.

circuits apply F.R.C.P. 52 generally to contested matters [In the Matter of C.M.SP.&P RR Co. 3F.3d 200 (7th Cir. 1993); Matter of Luce, 960 F.2d 1277 (5th Cir 1992)], the Ninth Circuit creates an exception where it is needed most and does not apply F.R.C.P. 52 to contested matters in fee application proceedings [Amended Order filed February 2, 1999 (4:11-12), Order filed March 23, 2001].

iv. Reasonable compensation is payable to counsel for an official committee under 11 U.S.C. §330 for "necessary services", which are defined as services which are performed in the exercise of the powers of such counsel's official committee under 11 U.S.C. §1103(c) and which are reasonably calculated to advance the interests of such committee and of the claims or interests represented by such official committee.[21] The services performed by Applicant, including without limitation those referenced in Fact §9, were reasonably calculated to advance the interests of the OEC and the debtor's non-insider stockholders. However, neither the bankruptcy nor district court stated or applied such principle, and, according to the district court, the bankruptcy court made the following findings of fact in Applicant's fee application proceedings which, however, violated and were made invalid by the requirement of 11 U.S.C. §330(a)(1) that Applicant be paid a reasonable fee for "necessary services": Applicant's services did not benefit the estate, that Applicant's fees were high relative to the estate [such 'economy, conservation of the estate' principle was expressly eliminated by enactment of the Bankruptcy Code of 1978 (Bankruptcy Rule 219(c), Advisory Committee Note thereto; In re Nucorp Energy, Inc., 764 F. 2d 655, 658 (9th Cir 1985); In re Lifschultz Fast Freight, Inc., 140 B.R. 482, 487 (Bkcy. N.D. Ill.

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[21] [Senate Report No. 94-1011, p.6 (1976), U.S.Code & Admin. News 1976, pp 5908, 5913, approving and incorporating the principle of Stanford Dailey v Zurcher 64 FRD 680, 684 (N.D. Ca. 1974); Pennsylvania v Delaware Valley Citizens' Counsel for Clean Air, 106 S.Ct. 3088, 3098 (1986); In re Heck's Properties, Inc., 151 B.R. 739, 745-746 (S.D.W.Va. 1992); Accord: In re Lifschultz Fast Freight, Inc., 140 B.R. 482, 485, 488 (Bkcy. N.D. Ill. 1992); In re Pettibone Corp., 74 B.R. 293, 309 (Bkcy. N.D.Ill. 1987) and In re Emons Industries, Inc., 76 B.R. 59, 61 (Bkcy. S.D.N.Y. 1987)]

1992)]; and Applicant spent time on "tangents which bore no fruit."[22]

2. The appellate courts abused judicial discretion by denying Applicant's requests to prove that all or substantially all of the assertions of fact in the district court's order denying Applicant's appeal were false and copied verbatim or substantially verbatim from the over 100 false assertions of fact without appropriate citations to the record in the debtor's brief for the following reasons: the district court instead permitted Applicant to identify a sample of 8 of such false assertions of fact in its order; such court admitted that 7 of such sample of 8 false assertions of fact (87.5%) were in fact false and copied verbatim from the false assertions of fact without appropriate citations to the record in debtor's brief; it is common sense and a truth of high school mathematics that such fact makes it highly likely that all or substantialy all of the assertions of fact contained in the district court's order were false and its decision therefore erroneous; by its express admission, the district court constructively admitted that substantially all of the assertions of fact in its order denying Applicant's appeal were false; and the court of appeals affirmed for the reasons stated by the district court.[23]

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[22] In addition, the bankruptcy judge improperly applied a principle according to which he considered that he could deny fees for numbers of hours he considered were not "necessary" as that term is used in 11 U.S.C. §330(a)(1) (cited in Amended Order filed February 2, 1999 (7:24-25), 8:6-8). However, the statute is clear that the term "necessary" refers to the nature and type of the services for which compensation is being requested and that the court's evaluation of the number of hours for which payment may be made for types of services which are necessary is limited to the "reasonableness" of the number of hours. According to 11 U.S.C. §330(a)(1)

> "reasonable compensation...(is awardable for)...necessary services rendered...based on...the time spent on such services..."

Under the statutory framework of such section, "services" is a term that is distinct from the terms "time" or "hours" and clearly refers to a type of service. Otherwise, for example, the last phrase would read "based on the time spent on such time" which would not make sense.

[23] It cannot be considered "sound judgment" for a court to deny the motion which, if granted, would identify with certainty whether all or substantially all of the other assertions of fact, upon which the order denying Applicant's appeal was based, were false, when such court has constructively admitted that it is highly likely that substantially all of the assertions of fact upon which it based its decision were false. Accordingly, such denials by the district court and the courts of appeal cannot constitute

Summary Argument for Writ

Argument §1.b. and c. reference at least 5 elements of the Ninth Circuit Court of Appeal's decision which seriously conflict with the decisions of the Courts of Appeals of other circuits and require that this petition be granted. In addition, the great departure from the accepted and usual course of judicial proceedings described in this petition requires that this court exercise its supervisory power to preserve, in the federal court system, the three most fundmental, all pervasive preconditions for dispensing justice, each of which was breached and violated in Applicant's case:

a. All court decisions in every legal subject area require that judges think logically and apply legal rules in reaching their decisions in order for such decisions to be just and

b. Such court decisions must not create the appearance of impropriety or corruption by the court.

When, as here, these combined violations occur simultaneously, the affront and injury to justice is magnified with an exponential effect, and compels this court's grant of this petition. Because these malevalent judicial activities can be applied to every type of case, they do not spread by reported case law, but rather in the conferences, assemblies and hallways where court officials meet, as shortcuts to solve crowded dockets, busy schedules, or for other more corrupt purposes. For these and other reasons, this court cannot wait for the case law to develop first in a variety of courts of appeals. When, because of the steadily increasing commentary on the malfunctioning of the judicial system, the black robes of judges are not accorded deference and esteem, the justice system will no longer function, and it will be too late.

Respectfully submitted: Roger A. Noback, pro se, 53 W. Jackson Blvd. - Ste. 1525, Chicago, IL 60606; 312/663-0800

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the exercise of judicial discretion, and must constitute the abuse of judicial discretion. The exercise of "sound judgment" requires that Applicant's requests be granted.

Whether Applicant filed dozens, hundreds or thousands of pages in connection with his appeal (see footnote 3 and the associated text to the Amended Order and the sole footnote to the one page order, each filed February 2, 1999) is irrelevant since such filings, other than his petition for rehearing, were not directed to the accuracy of the court's order, and the court's admission and constructive admission evidences the court didn't read or understand the other filings anyway.

Appendix 1

1. Euclid, Elements, Book Ten, "Definitions" I.1., "Propositions" 5-8 in Great Books of the Western World, Vol. 11, Encyclopedia Britannica, Inc. Chicago 1952:

> "Book Ten."
>
> "Definition I.1. Those magnitudes are said to be commensurable which are measured by the same measure, and those incommensurable which cannot have any common measure."
>
> "Proposition 5. Commensurable magnitudes have to one another the ratio which a number has to a number."
>
> "Proposition 6 If two magnitudes have to one another the ratio which a number has to a number, the magnitudes will be commensurable."
>
> "Proposition 7. "Incommensurable magnitudes have not to one another the ratio which a number has to a number."
>
> "Proposition 8. "If two magnitudes have not to one another the ratio which a number has to a number, the magnitudes will be incommensurable."

2. Aristotle, Categories, Chapter 7 [The Works of Aristotle Vol.I, W.D. Ross translation in Great Books of the Western World, Vol. 8, Encyclopedia Britannica, Inc. Chicago 1952]:

> "Those things are called relative, which, being either said to be of something else or related to something else, are explained by reference to that other thing...All relatives have correlatives...by "greater," greater than that which is less...Sometimes, however, reciprocity of correlation does not appear to exist. This comes about when a blunder is made, and that to which the relative is related is not accurately stated....The reason is that the original statement was inaccurate...If, then, the statement is made accurate, the connexion will be reciprocal...If we express ourselves thus accurately, at any rate the terms are reciprocally connected...Thus we may perhaps most easily comprehend that to which a thing is related...All relatives, then, if properly

defined, have a correlative. I add this condition because, if that to which they are related is stated as haphazard and not accurately, the two are not found to be interdependent. Let me state what I mean more clearly. Even in the case of acknowledged correlatives, and where names exist for each, there will be no interdependence if one of the two is denoted, not by that name which expresses the correlative notion, but by one of irrelevant significance....Further, if one thing is said to be correlative with another, and the terminology used is correct, then though all irrelevant attributes should be removed, and only that one attribute left in virtue of which it was correctly stated to be correlative with that other, the stated correlation will still exist....On the other hand, if, of two correlatives, one is not correctly termed, then, when all other attributes are removed and that alone is left in virtue of which it was stated to be correlative, the stated correlation will be found to have disappeared....Thus it is essential that the correlated terms should be exactly designated;...when the terminology is thus correct, it is evident that all correlatives are interdependent."

3. Locke, John, An Essay Concerning Human Understanding, Book II, Chapter XIV, §18 and Chapter XVII, §13 in Great Books of the Western World, Vol. 35, Encyclopedia Britannica, Inc. Chicago 1952:

Chapter XIV, §18: "(N)othing...(is)...a measure of duration but duration, as nothing is of extension, but extension..."

Chapter XVII, §13: "We can, I think, have no positive idea of any space or duration which is not made up of, and commensurate to, repeated numbers of feet or yards, or days and years, which are the common measures, whereof we have the ideas in our minds, and whereby we judge of the greatness of this sort of quantities."

4. Burke, Edmund, quoted under the definition of "proportion." in Webster's New International Dictionary of the English Language (G.& C. Merriam Company 1928):

"Proportion is the measure of relative quantity."

5. Weber, Max Economy and Society (English Translation

published by University of California Press 1978) Vol. I., p. 86:

> "Calculation in terms of money...is...the specific means of rational, economic provision...(and)...has the following primary consequences:.....(2) The quantitative statement of...the actual results of every completed action, in the form of an account comparing money costs and money returns..."

6. Bonbright, James C., The Valuation of Property (McGraw-Hill Book Company, Inc. 1937 - Published under the auspices of the Columbia University Council for Research in the Social Sciences), Vol I, p. 13):

> "[In this work]...we are using "value" as a mere colorless expression for "dollar amount."

7. Keynes, John Maynard, A Treatise on Money [Harcourt, Brace and Company 1930], p. 3:

> "A Money-of-Account comes into existence along with Debts, which are contracts for deferred payment, and Price-Lists, which are offers of contracts for sale or purchase. Such Debts and Price-Lists, whether they are recorded by word of mouth or by book entry on baked bricks or paper documents, can only be expressed in terms of a Money-of-Account."

8. Hand, Judge Learned, The Spirit of Liberty, p. 307 [Alfred A. Knopf 1960]:

> "You can't measure...incommensurables."

9. Orwell, G.'s paraphrase of some of Aristotle's comments in §7 of the Categories in Orwell, G., Politics and the English Language in Shooting an Elephant and other essays, p. 77 (Harcourt, Brace & World, Inc. 1950)]:

> "Our language becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts."

Appendix 4

Transcript of Hearing April 19, 1993

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:	Case No. 91-3-2674-TC
TRANSCISCO INDUSTRIES, INC., a Delaware corporation,	San Francisco, California
	Monday, April 19, 1993
	11:45 A.M.
Debtor.	Hearing re Fee Applications
	of Roger A. Noback....

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS E. CARLSON
UNITED STATES BANKRUPTCY JUDGE
(Filed May 24, 1993)

APPEARANCES:

For Debtor:	CRAIG M. PRIM Murray and Murray 303 Hansen Way, Suite 200 Palo Alto, CA 94304 (4 15) 852-9000
For Roger A. Noback:	ROGER A. NOBACK Law Offices of Roger A. Noback 343 S. Dearborn Street Chicago, IL 60604 (312) 663-0800

Appendix 5

.....(Other appearances and pages 1-4 omitted).....

Page 5

.....

THE COURT: Okay. I'm not going to grant the continuance, then. And let me say the following regarding the fees. I've asked you if you have any additional comments that aren't in your papers. I think the papers adequately address the situation.

Let me say the following about the fee application itself. As I say, what I will do regarding the continuance is I will deny it. Should this case turn out different from what we expect, should Mr. Noback arrange substantial infusions of money into the debtor, which form the basis for the ultimate plan of reorganization, then he can -- I invite him to move for reconsideration of the order I am going to enter today regarding the fees.

Let me make the following general comments before I get to the bottom line. First of all, I want to say something about the way in which I believe the Court should determine the appropriate fees in this case. What one normally does under existing rules and precedent is one looks at the number of hours and the hourly rate that the attorney charges and various other adjustments, which are basically minor adjustments up and down, to determine what

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an appropriate fee would be. And I think that in this particular case this is not an approach which is feasible.

The hours spent, the hours billed by Mr. Noback simply don't bear any relationship to the fees that should be awarded in this case. And that is so because the -- if, you know, assuming that this time actually was spent, which I do assume, the use of time is so grossly inefficient and disproportionate to what was at stake and what the ultimate product was that it's simply not an appropriate measure for awarding fees.

MR. NOBACK: Your Honor, this is Roger Noback. I am having difficulty hearing you --

THE COURT: Okay.

MR. NOBACK: -- speaking into the microphone.

THE COURT: Okay, I'll bring it closer. Is that

better?

MR. NOBACK: That is better, thank you.

THE COURT: Okay. The second point is that -- why I don't believe that hours are an appropriate base here is that so much of the time was spent on tangents which bore no fruit, and that there is another aspect of this work and that that is that many -- that the bondholders, or the equity committee, engaged in so many non-meritorious objections to what the other committees and the debtor were doing that some major adjustment must be made for that.

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The second major point I want to know is that I don't believe that the work performed, the contribution to the estate by the equity committee, had any real value to this estate or to the administration of the case at all and that the minor benefits that were made were offset by the -- by disruption in the form nonmeritorious objections.

Nonetheless, I do think that there is some basic activity that was performed here, and that one -- when the committee is appointed by the Court, by the U.S. Trustee, and when it is -- when counsel is appointed by the Court and work is performed pursuant to that, those appointments, it is not necessary for the applicant to show some benefit to the estate. I think what I should do here is take note of what the equity committee did and how well it did it.

And what they basically did here is they came up with a plan and disclosure statement and they made, they raised various objections to the way the other parties were proceeding with their plans and disclosure statement. That's the basic core of work that was done.

The plan that was put forward by the equity committee was not very well done. The objections made to the activities of the other parties and to their plan and disclosure statement were not very sound.

So I think, though, that given the irrelevance of this huge number of hours for which compensation is sought

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to the amount of work that was actually performed, I am going to look at the work that was performed and what was at stake. And as I say, when I look at that I come up with what the main activity was, was the preparation of these objections and the preparation of the plan and the disclosure statement and I don't find those to be very well done.

And what I think is the appropriate amount of fees here for all the work done in the case is as follows. The Court has previously awarded $40,000 in fees and the expenses sought. And what I am going to do here, is I am going to award an additional $30,000, plus all the expenses sought. That would leave the attorney recovering all expenses sought, plus $70,000, which is I think is very ample for what was done in this case considering the quality of the work. .....

Appendix 8

Transcript of Hearing February 9, 1996

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re: Case No. 91-3-2674-TC

TRANSCISCO INDUSTRIES, INC., San Francisco, California

a Delaware corporation, Friday, February 9, 1996

9:57 A.M.

Debtor.

Chapter 11

Hearing re: motions to reconsider.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS E. CARLSON
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtor: CRAIG M. PRIM
Murray & Murray
3030 Hansen Way, Suite 200
Palo Alto, CA 94304-1009
(415) 852-9000

For official Equity Security Holders' Committee: ROGER A. NOBACK
53 West Jackson Boulevard
Suite 1525

Chicago, IL 60604
(312) 663-0800

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.....

THE COURT: okay. I want about five minutes. I'll be back in five minutes and I'll give you the decision. I just need to make a couple of notes.

THE CLERK: All rise.

(Recess from 10:37 a.m. until 10:51 a.m.)

THE COURT; Please be seated. All right. I don't want to hear any more argument of any kind. I'm just going to give a ruling here. I'm going to deny all the motions

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for recons ideration. There are a couple of other matters to

be dealt with here in terms of rulings with respect to evidentiary motions.

I'm going to deny the motion to strike the Pease declaration that was filed ages ago. It was filed well before the April hearing - '93 hearing at which these fees were determined, and any objections should have been raised long before this.

Third, I'm going to - per Mr. Prim's request of judicial economy, if - I think it's probably the best way to say it, I am going to grant the motion to strike the Newsome and Carroll declarations simply on the basis that I'm--

MR PRIM: You mean the Aron and Carroll declarations?

THE COURT: Aron, yeah.

MR PRIM: Thank you, Your Honor.

THE, COURT: Sorry. Regarding the declarations, I had not relied on them in any case, and don't feel it necessary to rely on them, and I think it's best just to take them out of the record.

Let me say something about the reasons for denying the motions for reconsideration. First and foremost, the originally awarded fees in this case, fees and costs were generous. If there's any error, they were too high. I note

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that the committee and my - from my knowledge of the case, and I presided for this case from beginning to end, and in rather unusual circumstances, pursuant to the consent of the parties, I did all the settlement conferences in this case, and know very much about what led to the compromises under.lying the plan of reorganization. The Equity Committee had no meaningful role in those compromises, and the formulation of the plan that was finally approved.

Indeed, I would say that while they were operative and in the case, the Equity Committee was more of a hindrance to the case than a benefit to the advancement of the case. This wasn't because they were a party that had to be dealt with, that is inherent in the multi-party character of a bankruptcy case, but it was because of the essentially incompetent way in which they proceeded in the case. And that is why the Court vacated the order appointing all the professionals of the Equity Committee previously.

I also note in this regard, and in support of the last finding, Mr. Noback has shown himself completely unable to follow the rules and procedural orders of this Court. I'm not striking any of the papers filed in support of this motion because if there is an appeal, I want the Appellate Court to see what Mr. Noback does, and it will be very instructive to them in deciding whether he deserves more in this case.

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With respect to this benefit to the estate argument, although I note that the Equity Committee had provided no benefit toward completing the plan of reorganization, that is not the standard I applied. I don't believe the counsel for any committee needs to justify services, or fee applications on the basis that the services directly benefitted the estate by furthering the plan of reorganization. They have to be performed competently, and efficiently, and the fees were not allowed in greater amount here, because they were not reasonable and necessary in light of what should have been done by the Equity Committee, and that is the test.

With respect to the time sheets and all that, I think I've noted this

previously, this work was done so inefficiently that the billed hours, that the recorded hours are completely irrelevant in determining what the relevant fee is.

Appendix 12

Order filed February 2, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
IN RE TRANSCISCO INDUSTRIES, INC.,

ROGER NOBACK,
Fee Applicant/Appellant,
V.
TRANSCISCO INDUSTRIES, INC.,
Debtor/Appellee.

No. C 96-4523 SI

ORDER DENYING APPELLANT'S PETITION FOR REHEARING
Filed February 2, 1999

On January 25, 1999, Appellant Roger Noback filed a petition for rehearing regarding this Court's January 14, 1999 order denying his appeal of a bankruptcy court fee award.' On January 29, 1999, Noback filed an amended petition for rehearing. In his petition. Noback argues that the Court misapplied the applicable law and misconstrued material facts. The Court rejects both of Noback's contentions. However, ir his petition, Noback correctly points out several instances in which the Court erred in presenting non-material background facts. For the purpose of correcting the record with respect to these background facts the Court has issued an amended order which replaces the order dated January 14, 1999. Having done so, appellant's petition for rehearing is DENIED.
IT IS SO ORDERED.

Dated: February 1, 1999
SUSAN ILLSTON
United States District Judge

1Accompanying his 16 page petition were 280 pages of supplemental argument contained a "Draft [Requested] Supplement to Appellant's Reply Brief and "Draft Motion to Strike Debtor's Brief," both of which were filed as attached exhibits to Noback's declarations in support of the petition for rehearing. In his petition, Noback refers to these filings collectively as tie "Rehearing

Declarations." The Federal Rules of Appellate Procedure limit the length of a petition for rehearing to 15 pages. Fed. R. App. Proc. 40(b). Having circumvented the 15 page limit by filing 280 pages of supplemental argument, Noback now requests this Court to allow a page length extension to hi petition for rehearing. Noback's request is DENIED.

Appendix 14

Amended Order filed February 2, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE TRANSCISCO INDUSTRIES, INC., No. C 96-4523 S
ROGER A. NOBACK,
Fee Applicant/Appellant,
V.
TRANSCISCO INDUSTRIES, INC.,
Debtor/Appellee.

AMENDED ORDER RE APPEAL OF ATTORNEY'S FEES AWARDED IN BANKRUPTCY PROCEEDINGS

Appellant Roger A, Noback ("Noback") appeals a series of orders from Chief Judge Thomas E. Carlson of the United States Bankruptcy Court for the Northern District of California reducing his requested attorney's fees. Mr. Noback represented the Official Equity Security Holders Committee ("OEC") in the Chapter I I bankruptcy proceedings of Appellee and Cross-Appellant Transcisco Industries, Inc. ("Debtor"). Debtor's cross-motion requests a further reduction of Noback's fees along with the imposition of sanctions. Noback contends the Bankruptcy Court's ruling constitutes an abuse of discretion because the reduction was arbitrary and unsupported by the record. The Court disagrees. In reviewing the record, this Court finds that Judge Carlson provided sufficient findings to support his determination. Accordingly, the Court hereby AFFIRMS the orders of the Bankruptcy Court reducing Appellant's requested atto rney's fees.

BACKGROUND

Appellant Roger Noback contends that the Bankruptcy Court abused its discretion in awarding

him only $70,000 of the $340,000 in fees he requested.[24] This appeal encompasses several orders which are related to Noback's fee award: Order re Fees, May 14, 1993; Amended Order re Fees, June 1, 1993; Order (Setting Forth Length of Briefs), August 10, 1993; Order Approving Compensation for Professionals, December 21, 1993; Order Denying Motions for Reconsideration, March 28, 1996; and Order Denying Motion to Reconsider and Vacate Order, October 4, 1996.

The orders at issue relate to work performed by Noback on Debtor's Chapter I I bankruptcy case which commenced on July 1, 1991. Debtor Transcisco was a large publicly traded holding company engaged in the business of repairing railroad cars. The United States Trustee appointed the following three committees to represent the parties: the Official Committee of Unsecured Creditors ("OCC") represented all unsecured creditors (principally the banks), the Official Committee of Bondholders ("OBC") represented the holders of senior subordinated notes, and the Official Equity Security Holders Committee ("OEC") represented the non-insider stockholders. The Bankruptcy Court approved the employment of Mr. Noback as lead counsel for the OEC on March 4, 1992.

On July 20, 1992, the Debtor and each committee filed separate disclosure statements and plans of reorganization. The Bankruptcy Court deemed the OEC's disclosure statement "completely inadequate" (Tr. September 14, 1992, p. 13 -14). On November 13, 1992, the Debtor and OCC filed a consensual plan of reorganization, whereupon the Bankruptcy Court terminated the solicitation process with respect to prior plans and scheduled further hearings.

On January 14, 1993, the Bankruptcy Court took the extraordinary action of revoking Noback's appointment sua sponte. In so doing, Judge Carlson found that Noback was guilty of malfeasance, gross inefficiency, engaged in non-meritorious objections, and contributed no real value to the estate or the administration of the case (Tr. April 19, 1993, pages 6-7, 20). During the February 9, 1996, reconsideration hearing Judge Carlson commented on his decision:

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[24] The fees were requested in three separate fee applications covering the period from October 3 1, 1991 to January 14, 1993. All requested expenses, amounting to $26,492.19, were granted.

> [T]he Equity Committee was more of a hindrance to the case than a benefit to the advancement of the case. This wasn't because they were a party that had to be dealt with, that is inherent in the multi party character of a bankruptcy case, but it was because of the essentially incompetent way in which they proceeded in the case. And that is why the
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> Court vacated the order appointing all the professionals of the Equity Committee previously.
>
> I also note in this regard, and in support of the last finding, Mr. Noback has shown himself completely unable to follow the rules and procedural orders of this Court. I'm not striking any of the papers filed in support of this motion because if there is an appeal, I want the Appellate Court to see what Mr. Noback does, and it will be very instructive to them in deciding whether he deserves more in this case. (Tr. February 9, 1996, p. 28:2-5).

On February 4, 1993 the Bankruptcy Court issued a memorandum order explaining the basis for revoking Noback's appointment and on February 25, 1993, Judge Carlson ordered Noback to file a final fee application. In April of 1993, the Debtor, the OCC, and the OBC reached agreement on the reorganization terms which were eventually confirmed by the Bankruptcy Court.

On April 19, 1993, Noback was awarded $70,000 at a hearing held on his final fee application.[25] On November 4, 1996, Noback filed this appeal. On May 8, 1998, after numerous delays, Noback finally filed his opening brief in this court. It consisted of a three-module, 380 page brief that was later supplemented by 9 bound volumes of excerpts

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[25] In a two-step process, Noback was first awarded $40,000 of "interim compensation" on June 18, 1992 for work performed during the period of October 3, 1991 through April 30, 1992. (Tr. June 18, 1992, p. 2:15-19). Or. June 11, 1993, Noback was awarded a final total of $70,000 (including the earlier award of $40,000) for all work performed during the proceedings. (Tr. June 11, 1993).

of record[26] Debtor has cross-appealed for a further reduction in fees and for tie imposition of sanctions. Briefing is now complete and, pursuant to Civil Local Rule 16- 1(d), the matter is deemed submitted for decision without oral argument.[27]

JURISDICTION

This court has jurisdiction, under 28 U. S. C. § 1 5 8(a)(1), over this appeal from the orders of the bankruptcy court reducing Appellant's requested attorney's fees. Section 158 gives the district courts jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy courts within the district. Appellant has elected to have his appeal heard by this court rather than the Bankruptcy Appellate Panel. See 28 U.S.C. § 157. The original proceeding had federal question jurisdiction arising under 26 U.S.C. § 7426 and related to a case under Chapter 11 of the United States Bankruptcy Code.

LEGAL STANDARD

A bankruptcy court has discretion to determine reasonable compensation for services rendered in bankruptcy proceedings under the criteria set forth in 11U.S.C. § 330(a). See Southwestern Media Inc. v. Rau, 708 F.2d 419, 422 (9th Cir. 1983); In re Larson, 174 B.R. 797, 800 (B.A.P. 9th Cir. 1994). The standard of review in this court is whether the bankruptcy court abused its discretion or erroneously

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[26] The Court notes that the entirety of Noback's argument could have been contained in a standard length brief.

[27] In connection with a motion for extension of time to file his reply brief, which motion was filed on October 28, 1998 and was denied on October 29, 1998, Noback referred to a "motion to strike appellee's opening brief' which he was in the process of preparing. See Noback's Motion to Extend the Date for Filing Appellant's Reply Brief at 2:12-20. He attached to his supporting declaration a "draft" of the motion to strike, cot reprising pages 1-19 and 107-120, and explained that "of necessity" the brief would be over 120 pages in length. As of January 14, 1999, the date that this Court closed the pleadings and deemed the matter submitted, Noback had not filed any such motion, nor had sought leave to do so. In any event, upon reviewing Debtor/Appellee's opening brief, the Court finds no basis to justify striking the brief

applied the law in making its award. See In re Nucorp, 764 F.2d 655, 657 (9th Cir. 1985). The bankruptcy court's findings of fact are reviewed for clear error. Southwestern Media Inc., 708 F.2d at 422.

DISCUSSION

1. The Methodology for Calculating Fees

Noback first contends that the Bankruptcy Court erred as a matter of law by refusing to follow
the "lodestar" method of calculating fees. Debtor responds that while the lodestar method is the standard approach in fee-shifting cases, it is not the exclusive approach in bankruptcy proceedings. Debtor argues that the Ninth Circuit approves fee determinations that are not based on lodestar methodology in circumstances "where the fee application does not provide an appropriate basis for a fee calculation." In re Kitchen Factors, 143 B.R. 560, 562 (9th Cir. B.A.P. 1992) (citing Unsecured Creditors' Committee v. Puget Sound Plywood. Inc., 924 F.2d 955, 959 (9th Cir. 1991).

The Court agrees with Debtor. The award of professional fees is governed by 11 U. S.C. § 330, which provides for attorney compensation for services that were actual, necessary, and reasonable. The bankruptcy court's determination of fees normally begins with the calculation of the initial "lodestar" amount. See In re Yermakov, 718 F.2d 1465, 1471 (9th Cir. 1983). However, "the court may employ alternative approaches where appropriate." In re Kitchen Factors, 143 B.R. at 562.

For example , in In re Kitchen Factors, the number of hours claimed as compensable by the fee applicant was "grossly disproportionate" to the amounts at stake. On appeal, the Ninth Circuit Bankruptcy Panel approved the abandonment of the lodestar approach In these circumstances. Id. See also, Unsecured Creditors' Committee v. Puget Sound Plywood, Inc., 924 F. 2d 95 5, 961 (9th Cir. 1991) (approving the abandonment of the lodestar approach in a bankruptcy proceeding where the fee application was not sufficiently detailed, and reasoning that "if a fee application is inadequate, the court should not

be forced to wade through it in order to calculate the lodestar.").

From the above cases it is clear that in bankruptcy proceedings, the application of the lodestar approach is not mandatory Id. at 960. In fact, it is appropriate to abandon the lodestar method where the detail of time spent is grossly disproportionate to the amounts at stake. See In re Kitchen Factors 143 B.R. 560, 562 (B.A.F. 9th Cir. 1992).

The reason for the Bankruptcy Court's departure from the lodestar approach in the instant case was explained by Judge Carlson at the April 19, 1993 hearing on Noback's final fee application:

> What one normally does under existing rules and precedent is one looks at the number of hours and the hourly rate that the attorney charges and various other adjustments, which are basically minor adjustments up and down, to determine what an appropriate fee would be. And I think in this particular case this is not an approach which is feasible.
>
> T]he hours billed by Mr. Noback simply don't bear any relationship to the fees that should be awarded in this case.... [A]ssuming that this time actually was spent, which I do assume, the use of time is so grossly inefficient and disproportionate to what was at stake and what the ultimate product was that it's simply not an appropriate measure for awarding fees. (Tr. April 19, 199'), pages 5:19 - 6: 1 0).

At another point In the proceedings, the Bankruptcy Judge explained his concern regarding
Noback's fee requests:

> "The fees and costs incurred by the OEC are unreasonably high In light of the size of the estate, the nature of the interest represented, and the limited goals of the committee." (Tr. February 4, 1993, p. 3: 4-6).

Employing a rationale similar to the one approved in In re Kitchen Factors, Judge Carlson discarded the lodestar approach because he believed that the excessive number of hours billed by Noback reflected a use of time that was "grossly inefficient and

disproportionate" to the stakes involved.

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Accordingly, the Court finds that Judge Carlson's abandonment of the lodestar approach was appropriate in the instant circumstances where the number of hours sought in compensation bore no relationship to the stakes involved In the bankruptcy proceedings. See In re Kitchen Factors, 143 B.R. at 562.

2. **Factual Support for the Bankruptcy Court's Determination**

Noback next contends that the Bankruptcy Judge abused his discretion in calculating Noback's fee award by not providing specific findings to support the 80% reduction In Noback's fees. Judge Carlson reduced Noback's fee award to $70,000 plus expenses for Noback's preparation of the disclosure statement, objections, and the reorganization plan. (Tr. April 19, 1993, p. 8:4-13).[28] When a bankruptcy judge reduces the amount of attorneys' fees sought in a fee application under the lodestar approach, the court must explain the basis for the fee reduction by reference to the specific hours eliminated and the factors involved in the determination of the billing rate used. In re Yermakov, 718 F.2d 1465, 1471 (9th Cir. 1983). Where, as here, the bankruptcy judge reduces the fee award under an alternative method, the bankruptcy judge must still provide specific reasons for the reduction, but need not do so with reference to lodestar factors. In re Kitchen Factors, 143 B.R. at 563. Accordingly, this Court reviews the bankruptcy judge's specific reasons for the fee reduction for an abuse of discretion.

In determining a fee award in bankruptcy proceedings, the bankruptcy judge must apply the criteria outlined In 11 U.S.C. §330. According to § 330, an applicant is entitled to "reasonable compensation for actual, necessary services ... based on the nature, the extent and the value of such services. . ." The criteria under § 330 require the exercise of reasonable billing judgment. Unsecured

[28] Judge Carlson commented during the reconsideration hearing, "the originally awarded fees in this case, fees and costs were generous. If there's any error, they were too high" (Tr. February 9, 1996, p. 5:6-13).

Creditors' Committee v. Puget Sound Plywood, Inc., 924 F.2d at 959. Reasonable billing judgment involves an assessment of the probable cost of legal services in light of the stakes involved, and the balancing of the possible benefit to the interests represented in light of the likelihood of success. Id.

The basis for the Bankruptcy Court's reduction of Noback's fees are set forth in its Memorandum Order of February 4, 1993, and in the transcripts of January 14, 1993, April 19, 1993 and February 9,

1996. In the April 19, 1993 hearing on Noback's final fee application, Judge Carlson explained his approach to the calculation of Noback's award: "[G]iven the irrelevance of th[e] huge number of hours for which compensation is sought to the amount of work that was actually performed, I am going to look at the work that was performed and what was at stake." (Tr. April 19, 1993, pages 7:24-8:3). Applying this approach, the Bankruptcy Court found that the vast majority of Noback's billed hours related to services that were neither necessary to the proceedings nor competently performed. Specifically, Judge Carlson found that (1) Noback billed a grossly excessive number of hours for services that were not necessary to the proceedings, and (2) Noback consistently failed to adequately perform the tasks most basic to his responsibilities as lead counsel to the OEC, such as the submission of a disclosure statement and objecting to the plans of other committees. Each of these findings is examined In more detail below.

A. Grossly Excessive Time Spent

As a first basis for the reduction in Noback's fees, Judge Carlson found that Noback's focus on irrelevant issues and "grossly inefficient" use of time resulted in the expenditure of excessive hours that were not necessary to the proceedings. (Tr. April 19, 1993, p. 6:7).

At the June 15, 1992 hearing on Noback's first two fee applications (covering October 3, 1991 thru April 30, 1992), Judge Carlson stated: "I am simply stupefied at the amount of time that is sought for various tasks here." (Tr. June 15, 1992, p. 53:21-23). Judge

Carlson continued: I don't know that I've ever seen an application that to me had more slippage in it than this. I'm not saying the time wasn't spent; I'm just saying it was just not necessarily spent." (Id. at p. 53:10-13) (emphasis added).

Judge Carlson observed that the only real accomplishment performed by Noback during the period of the first two fee applications was getting himself appointed to the OEC. (Id. at pages 52:23-53:3). For this accomplishment, Judge Carlson awarded Noback $40,000 In "interim compensation." (Tr. June 18, 1992, p. 2:' 5-19). Judge Carlson refused, however, to award Noback the full amount requested ($150,091 plus costs) because the majority of hours Noback spent related to services that Judge Carlson deemed unnecessary to the proceedings. (Tr. June 15, 1992, p. 52:21-53:17). For example, Judge Carlson pointed out that

"Noback has made numerous motions and objections to positions taken by the Debtor and

other committees. These motions and objections have been uniformly without merit, were often untimely, and in many instances border on being frivolous." (Tr. February 4, 1993, pages 2:25-3:3).

Judge Carlson further observed that

> "I think I get an idea of how the excessive number of billed hours happened from listening to Mr. Noback. He doesn't get to the point very well. He doesn't define the task precisely (Tr. June 15, 1992, p. 53:13-16).[29]

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[29] In the Joint Objection to Noback's final fee application, the debtor, the OBC and the OCC,
echoed Judge Carlson's earlier observations:

> "Any professional who dealt with Noback for very long realized that conversations would drag on and on and be followed by correspondence confirming the conversation, requests for information, lengthy documents advocating Noback's theories, and additional conversations. Accordingly, the debtor sought to limit its exposure by limiting the number

Noback's failure to work efficiently or focus on relevant matters led Judge Carlson to conclude that most of the hours billed by Noback related to services that were not necessary to the proceedings. (Id. at p. 53:13).

In addition to Noback's irrelevant motions/objections and inability to work efficiently, Judge Carlson was also disturbed by the sheer number of hours billed by Noback. In the memorandum that revoked Noback's appointment to the OEC, Judge Carlson specifically criticized the excessive number of hours billed in the first two fee applications. Quoting directly from the U.S. Trustee's objections to Noback's first two fee applications, Judge Carlson stated:

> " As a preliminary matter, the United States Trustee is astounded by the amount of time reflected in both applications. Even though the hourly rate is quite low, the overall amount of compensation sought is still enormous. During the seven months for which compensation is requested, 1425.9 hours were incurred. This equates to over 204 hours per month and 47+ hours per week. There is one entry in the Second Application of 20 hours. Only the accountants spent more time.
>
> In comparing the time for just the Second Application (947 hours) with the other professionals more time was spent by Mr. Noback than was spent by debtor's counsel, creditor's committee's counsel and bondholders' committee's counsel combined (882 hours). The Unites States Trustee respectfully submits that the amount of time requested is per se unreasonable. " (Judge Carlson quoting with approval from the U.S. Trustee's objection to Noback's first two fee applications, Tr. February 4, 1993, p. 3: 11-19).

Despite the fact that Noback did not represent the primary player in the

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> of people who wasted their time talking to Noback. This exasperation was ratified by the OBC, whose counsel simply refused to discuss matters with Noback, because he found such conversations to be a complete waste of time." (Tr. April 15, 1993, p. 16:15-24 .

bankruptcy proceedings, Judge Carlson noted that Noback nevertheless managed to bill more hours than all the other parties combined during the period of the second fee application. Id. In the third and final fee application period, Noback sought $191,200 based on 1913 billed hours. See Noback's third fee application, March 29, 1993. Judge Carlson balked at this request and instead added $30,000 to the prior interim award to bring Noback's total award to $70,000. In drastically reducing Noback's fee request, Judge Carlson noted that the excessive number of hours that Noback billed demonstrated a use of time that was "grossly inefficient" and "spent on tangents which bore no fruit." (Tr. April 19, 19931 p. 6:3-21).

In reviewing Noback's third fee application, Judge Carlson found that Noback billed an excessive number of hours for services that were simply not necessary. Judge Carlson again found that Noback had "engaged in so many non-meritorious objections to what the other committees and the debtor were doing that some major adjustment must be made" for unnecessary services. (Id. at 6:23-25). In the hearing on Noback's request for reconsideration of the fee award, Judge Carlson explained that "[services] have to be performed competently and efficiently, and the fees were not allowed in greater amount here because they were not reasonable and necessary in light of what should have been done by the Equity Committee, and that is the test." (Tr. February 9, 1996, p. 29:8-12).

There was nothing clearly erroneous in these findings, and Judge Carlson did not abuse his discretion in reducing Noback's fee award based on the performance of services that were neither necessary nor reasonable. See 11 U.S.C. § 330(a).

B. **Inability to Produce an Adequate Disclosure Statement or Reorganization Plan**

The second ground on which Judge Carlson reduced Noback's fees was Noback's failure to produce an adequate disclosure statement or plan of reorganization. Although Judge Carlson noted that the core task of the OEC was the preparation of a disclosure statement, a reorganization plan, and objections to plans propounded by the other committees, Judge Carlson found that Noback thoroughly failed at these tasks. (Tr. April 19, 1993, p.7:15-23). Judge Carlson observed:

"Roger Noback, lead counsel for the OEC, has been unable to prepare a legally adequate disclosure statement and plan of reorganization. The Fourth Amended Disclosure Statement of the OEC and the Second Amended Plan of the OEC are practically

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unintelligible and patently incomplete. This is so despite the fact that they have been amended many times over several months and despite the extraordinarily large fees requested by Noback for the work in question." (Tr. February 4, 1993, p. 2:18-25, emphasis supplied)[30]

Judge Carlson specifically found that the OEC disclosure statement did not attach a plan, did not contain a description of the plan, and contained no headings. (Tr. January 14, 1993), p. 5:6-13). Despite his familiarity with the case, Judge Carlson still found Noback's disclosure statement "incomprehensible." Id. Although overall, Noback billed more than 1500 hours in work related to the OEC plan and the OEC disclosure statement and he OEC's objections to the other plans and disclosure statements, Judge Carlson found these services incompetently performed, of de minimis value, and ultimately irrelevant to the proceedings. See Tr., April 19, 1993, pages 5-8. Again, there has been no showing that these findings are clearly erroneous.

In reviewing the record, this Court finds that the bankruptcy court did state specific factual findings to support its determination of Noback's fee award. In accordance with 11 U. S. C. § 3 3 0, Judge Carlson found that the excessive number of hours billed by Noback bore no relation to the performance of necessary services. (Tr. February 9, 1996, p. 29:8-12). Judge Carlson noted Noback's failure to adequately perform the basic tasks as lead counsel of the OEC and his inability to pursue arguments that were relevant to the interests of Noback's client.

Accordingly, this Court finds that Judge Carlson did not abuse his discretion in reducing Noback's requested attorneys fees. if anything,

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[30] Apparently, even Noback agreed with Judge Carlson when he conceded, "I don't assert that what I filed is legally adequate." (Tr.. January 14, 1993, p. 50:12).

the fees awarded were generous under the circumstances. Given the standard of review in this matter, however, this Court declines to grant Debtor's cross-appeal seeking further reductions in the fees awarded. Accordingly, this Court hereby AFFIRMS the fee award of the Bankruptcy Court.

CONCLUSION

For the foregoing re sons, the Court hereby AFFIRMS the fee awarded to Roger A. Noback by

the Bankruptcy Court. Both Noback's appeal and debtor's cross-appeal for a further fee reduction and sanctions are DENIED.

IT IS SO ORDEf ED.

Dated: February 1, 1999
SUSAN ILLSTON
United States District Court

FILED MAR 2 3, 2001

NOT FOR PUBLICATION

UNITI D STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re

Nos. 99-15679, 99-15781

TRANSCISCO INDUSTRIES, INC.,

a Delaware corporation,

D.C. No. CV-96-04523-SI

Debtor.

MEMORANDUM*

ROGER A. NOBACK,

Appellant,

V.

TRANSCISCO INDUSTRIES, INC.,

Appellee.

Appeal from the United States District Court for the Northern District of California

Susan Elston, District Judge, Presiding

Submitted March 15, 2001**

San Francisco, California

*This disposition is noi appropriate for publication and may not be cited to or by the courts of this circuit except as proovided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed.

R.App. P. 34(a)(2).

Before: RErNHARDT, RYMER, and FISHER, Circuit Judges.

Roger A. Noback appeals the bankruptcy court's attorney fee award and the denial of his motion for sanctions and motion to file an enlarged motion for sanctions before the district court. We have Jurisdiction, 28 U.S.C. § 158(d); 28 U.S.C. § 1291, and affirm for the reasons stated by the district court.

Noback contends th at the bankruptcy court erred when it deviated from

the lodestar approach in calculating his attorney's fees. We review a bankruptcy court's fee award for an abuse of discretion and a bankruptcy court's factual findings for clear error. See Unsecured Creditors' Comm. v. Puget Sound Plywood Inc., 924 F.2d 955, 957 (9th Cir. 1991). Although the lodestar approach is customary for attorney fee calculations, this court has held that it is not required in the bankruptcy context , where it would "not realistically quantify to numerical precision" the fee award. Id. at 960 (quoting In re Great Sweats, Inc., 113 B.R. 240, 244 (E.D. Va, 1990). Because the record supports the bankruptcy court's determination that Noback's work was so "incompetent" and "grossly inefficient" as to render the lodestar approach useless, the bankruptcy court did not abuse its discretion when it deviated from the lodestar approach. - See id. Further, our review of the record reveals that the bankruptcy court's fee award to Noback was generous

indeed, and, regardless of the particulr procedure used to determine the fee in this case, the amount would not exceed the $70,000 awarded.

Noback moves for sanctions against Transcisco for numerous so-called "false" assertions made in Transcisco's operating brief before the district court. We review a district court's denial of sanctions under Fed. R. App.P. 38 for an abuse of discretion. See Lyddon v Geothermal Properties, Inc. 996 F.2d 212, 213 (9th Cir. 1993). After reviewing Noback's motion for sanctions before the district court, we conclude that none of his claims has merit. Noback also contends that the district court erred whe nit denied as duplicative his 207-page motion to enlarge his motion for sanctions. The district court did not abuse its discretion because Noback's original motion for sanctions was utterly without merit and Noback's 207-page brief for an enlarged sanctions motion followed his filing of over 500 pages of other pleadings making the same or similar arguments.

Finally, Noback's motion for sanctions against Transcisco in this court is frivolous and is denied.

AFFIRMED

Appendix 29

FILED MAY 11, 2001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re

Nos. 99-15679, 99-15781

TRANSCISCO INDUSTRIES, INC.,
a Delaware corporation, D.C. No. CV-96-0452 -S-I

Debtor.
ORDER

ROGER A. NOBACK,
Appellant,
V.
TRANSCISCO INDUSTRIES, INC.,
Appellee.

Before: REINHARDT, RYNER, and FISHER, Circuit Judges.

The panel has unanimously voted to deny the petition for

rehearing and

petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge of the court ias requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

Tashima and Fisher vote to deny the petition for rehearing en banc and

Judge Zilly so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has reqi- ested a vote on en banc rehearing. See Fed.R.App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.